IN THE

Supreme Court of the United States

October Term, 1978

No. 78-141

D. H. OVERMYER,

Petitioner,

vs.

MAX W. FORSYTHE, HELEN H. FORSYTHE, E. BUSH HAYDEN and JEAN MULLIKEN,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner D. H. Overmyer prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on April 17, 1978. Petitioner's Petition for Rehearing and Rehearing En Banc was denied by an Order dated June 16, 1978.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported. It is reproduced at pages 1-9 of the appendix filed with this Petition (hereafter cited as "App."). The Order of the United States District Court for the Northern District of California denying petitioner's motion to dismiss for lack of personal jurisdiction and its later Findings of Fact and Conclusions of Law and Judgment have not been reported. They are reproduced at App. 11-20.

Jurisdiction.

The Judgment of the Court of Appeals sought to be reviewed was entered April 17, 1978 (App. 1-9). The Petition for Rehearing and Rehearing En Banc was denied by an Order dated June 16, 1978 (App. 10). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provision and State Statute Involved.

The Fourteenth Amendment to the United States Constitution provides, in part:

> ". . . Nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

California Code of Civil Procedure §410.10 states in full:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

Questions Presented.

I. Respondents brought a diversity action in a California federal court against petitioner, a New York resident. The action was based upon petitioner's purported guaranty of certain alleged obligations of a corporation (not party to the action) in connection with a lease by the corporation of certain property located in Oregon. Although the negotiation of the underlying lease transaction occurred in California, petitioner neither participated in the negotiations nor was present in California during them. Some time during the negotiation of the underlying lease transaction respondents-lessors insisted upon petitioner's guaranty as

a condition to their execution of the lease. Petitioner, upon learning of this demand, signed a guaranty in New York. California's long-arm statute is co-extensive with the due process clause of the Fourteenth Amendment. Where petitioner's contacts with California were otherwise insignificant and the guaranty was only given at the insistence of the respondents, was petitioner constitutionally subject to personal jurisdiction in California?

II. In diversity actions against non-resident defendants, should federal courts reach for and expand the scope of jurisdiction over non-residents beyond that permitted by the state courts of the forum state so as to encourage forum shopping and increase the burden of diversity jurisdiction upon the federal judiciary?

Statement of the Case.

Respondents filed an action against petitioner in the United States District Court for the Northern District of California premised upon petitioner's purported guaranty of certain alleged lease obligations of D. H. Overmyer, Inc. (Oregon) (hereafter "Oregon, Inc."), an Oregon corporation (App. 1). The alleged lease obligations arose out of a sale and leaseback transaction between Oregon, Inc. and respondents for a warehouse and office in Portland, Oregon (App. 1-2). At the time the lease and guaranty were executed, petitioner was the sole owner of D. H. Overmyer, Inc. (Ohio) (hereafter "Ohio, Inc."), which in turn was the sole owner of Oregon, Inc. (App. 1). Neither Oregon, Inc. nor Ohio, Inc. were named as defendants in the action.

Two of the four respondents are, and at all relevant times have been, residents of the State of California.

The other two respondents are, and at all times relevant have been, residents of the State of Oregon and the District of Columbia, respectively (App. 13).

Petitioner is, and at all relevant times has been, a resident of the State of New York (App. 21, 31). Petitioner has at no relevant time been a resident of the State of California (App. 31). Petitioner's place of business is, and at all times relevant has been, the State of New York (App. 31). At no time has the petitioner personally maintained an office, had a telephone listing or employees within the State of California (App. 31).

In October 1968, respondent Max W. Forsythe (hereafter referred to as "Forsythe") was informed by a California real estate broker that Oregon, Inc. was offering for sale and leaseback a warehouse and office located in Portland, Oregon (App. 1). The broker offered to put Forsythe in touch with a representative of the corporation to discuss details of the potential investment (App. 43).

After some preliminary investigation of the corporation and the warehouse and office in Portland, Forsythe concluded that he would be interested in the possibility of the proposed purchase and leaseback, but only upon certain terms and conditions (App. 43).

Forsythe and his personal attorney then met with J. R. B. Fitzsimmons (hereafter "Fitzsimmons"), assistant secretary of Ohio, Inc. and an attorney, for a period of several days in October, 1968, in Menlo Park, California, in order to negotiate the sale and leaseback with Oregon, Inc. (App. 44).

Some time during the course of negotiations, Forsythe first disclosed to Fitzsimmons that he would not enter

into a proposed purchase and leaseback unless petitioner personally guaranteed the performance of the lease by Oregon, Inc. (App. 44). Forsythe therefore insisted, as a precondition to entering into the sale and leaseback, that petitioner make such personal guaranty (App. 26). After advising Forsythe that he had no authority to bind petitioner to a guaranty obligation, Fitzsimmons apparently communicated Forsythe's position by telephone to someone in New York (App. 34, 43-4, 48).*

As a result of Forsythe's insistence on petitioner's personal guaranty, on October 18, 1968, petitioner sent a telegram from New York to Forsythe in California agreeing to guarantee performance of Oregon, Inc.'s lease obligations (App. 2). Thereafter, on October 21, 1968, petitioner executed a guaranty in New York and sent it by mail to Forsythe (App. 2). The lease between Forsythe and Oregon, Inc. was entered into on or about October 18, 1968 (App. 35, 37).

At no time did Fitzsimmons state to respondents or their attorney that he represented petitioner personally, and at no time has Fitzsimmons been paid any compensation by petitioner individually (App. 33). At no time did petitioner travel to California or participate in the negotiations in California with respect to either the guaranty or the sale and leaseback transaction (App. 31).

The District Court did not find that Fitzsimmons represented petitioner personally at any time during the negotiations in California or otherwise in connection with the sale and leaseback or the guaranty. Instead,

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*It is not clear with whom Fitzsimmons may have talked, and the District Court made no Finding of Fact on this point.

it found only that the negotiations were conducted by and between Forsythe and his attorney, on the one hand, and Fitzsimmons, "who represented himself to be an attorney employed [by] D. H. Overmyer Co. (Ohio)" on the other (App. 14).

By his guaranty, petitioner guaranteed until October 17, 1973, "the full and prompt payment by Tenant of all sums to be paid, expended and disbursed by Tenant and the full and prompt performance of any of the other covenants and conditions of The Lease at the times and in the manner and mode as provided by The Lease" (App. 35). As the court below noted, the lease provided that it, the lease, would be subject to the jurisdiction of California courts and that California law would govern (App. 2). There was no such provision in the guaranty.

Oregon, Inc. allegedly failed in its obligations as lessee, and on October 25, 1973, respondents sued petitioner on his guaranty (App. 37-39). Subject matter jurisdiction in the District Court was invoked pursuant to the doctrine of diversity of citizenship (App. 37).

On January 28, 1974, petitioner filed a motion to dismiss respondents' complaint pursuant to Federal Rule of Civil Procedure 12(b)(2) on the ground that the court lacked personal jurisdiction over him (App. 40-41). The motion was denied (App. 11-12).

This action was thereafter presented on a stipulation of agreed facts and upon the affidavit of Forsythe dated May 19, 1975 (App. 21-30). On July 17, 1975, Findings of Fact and Conclusions of Law were filed by the District Court (App. 13-19). The court awarded judgment to the respondents in the sum of $90,618.17 together with interest thereon at the rate of 7% per

annum from the date of judgment and attorneys fees in the amount of $11,796.38 (App. 20). Petitioner thereafter timely appealed to the Ninth Circuit Court of Appeals, challenging, *inter alia*, the District Court's assumption of personal jurisdiction over him (App. 2).

The Ninth Circuit, after noting that California's long-arm statute (CAL. CODE CIV. PROC. Section 410.10) permits personal jurisdiction to "the outer limits of due process under the state and federal constitutions, . . ." (App. 3) *first concluded that the petitioner did not have sufficient contact with California to support general jurisdiction over him* (App. 4). It then stated, however, that

> (a) "[petitioner] participated personally to secure a benefit for his corporation and, indirectly, himself." (App. 6),
>
> (b) "[petitioner], through Fitzsimmons, interjected himself into the transaction by assuming personal liability in the event of default on a contract expressly subject to jurisdiction in the California forum." (App. 7), and
>
> (c) "the guaranty was part of the negotiating strategy in California." (App. 7).

From this, the Court apparently concluded that petitioner had "purposefully availed himself of the privilege of conducting activities within California," and that jurisdiction over petitioner was reasonable. It affirmed the District Court's judgment (App. 9).

REASONS FOR GRANTING THE WRIT.

I

The Approval of Personal Jurisdiction Over Petitioner by the Court Below Conflicts With the Teaching of This Court in Hanson v. Denckla. The Question of Personal Jurisdiction Over Petitioner Raises an Important Question of Federal Law Which Should Be Settled by This Court.

A. Petitioner Could Not Be Subject to the Jurisdiction of the California Court Unless He Engaged in Some Act by Which He Purposefully Availed Himself of the Privilege of Conducting Activities Within California, Thereby Invoking the Benefits and Protection of Its Laws.

The decisions of this Court in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), and its progeny define the limitations on a state's power to assume *in personam* jurisdiction over a non-resident defendant. For such jurisdiction to attach, a defendant must have such "minimum contacts" that maintenance of the action will not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington,* 326 U.S. at 316.

Where a non-resident defendant's activities within a state are "substantial" or "continuous and systematic," there are sufficient contacts between the defendant and the state to support jurisdiction even if the cause of action is unrelated to the defendant's forum activities. *Perkins v. Benguet Consolidated Mining Co.,* 342 U.S. 437, 447-48 (1952). This jurisdiction is often referred to as "general jurisdiction." In the instant action, the court below found that petitioner did not have sufficient

contact with California to support general jurisdiction over him (App. 4).

Where a non-resident's contacts with the forum state are insufficient to confer general jurisdiction, the issue of personal jurisdiction turns on an evaluation of the nature and quality of the defendant's contacts in relation to the cause of action being sued on. *Hanson v. Denckla,* 357 U.S. 235, 253 (1958). For some time, the Ninth Circuit has adopted the following approach in making this evaluation:

> (1) The non-resident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. (2) The claim must be one which arises out of or results from the defendant's forum-related activities. (3) Exercise of jurisdiction must be reasonable.

L. D. Reeder Contractors v. Higgins Industries, 265 F.2d 768, 773-74 n. 12 (9th Cir. 1959). Accord: *Hanson v. Denckla,* 357 U.S. 235.

Petitioner respectfully submits that the court below erred in its determination that the petitioner, through his guaranty of Oregon, Inc.'s lease obligations, had "purposefully avail[ed] himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws." Petitioner further respectfully submits that the court below also erred in determining that the exercise of jurisdiction in this action by the federal court in California was reasonable.

B. The Court Below Erred in Concluding That Petitioner Purposefully Availed Himself of the Privilege of Conducting Activities Within the Forum State and That Jurisdiction Over Him Was Reasonable.

Petitioner did not "interject" himself into the sale and leaseback transaction as part of a "negotiating strategy." The simple and clear fact is that sometime during the negotiations between respondents and Oregon, Inc. (to which petitioner was not a party), *Forsythe* insisted upon petitioner's guaranty as a condition of going forward with the transaction. But for this insistence, petitioner would have had no personal involvement in the transaction whatsoever. Accordingly, personal jurisdiction over him in California was constitutionally impermissible.

"It is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla, supra,* 357 U.S. 235, 253. An act of a party is simply not "purposeful" where it is insisted upon or required by another. The case of *Sibley v. Superior Court,* 16 Cal.3d 442, 546 P.2d 322, 128 Cal.Rptr. 34 (1976), makes this point abundantly clear.

In *Sibley,* the California Supreme Court held that a non-resident individual guarantor was not properly subject to the jurisdiction of the California courts under facts which are strikingly similar to those found in the case at bar. The facts in *Sibley* are as follows:

Carlsberg, a limited partnership whose principal place of business was in California, formed another limited partnership in California with Sunrise, a Georgia corporation, for the purpose of operating two mobile home parks in Georgia. Sunrise, the Georgia corporation, was the general partner of the new limited partnership. Under the terms of the limited partnership agreement, Sunrise promised to make certain monthly payments to Carlsberg, and Sibley, a resident of Florida, guaranteed Sunrise's performance.

The Court found that Sibley's guaranty had induced Carlsberg to enter into the new limited partnership and that it would not have done so in the absence of that guaranty. It further found that the performance guaranteed by Sibley involved the payment of certain monies to Carlsberg in California and that parties to the partnership transaction other than Sibley had considerable contacts with California in connection with the negotiation and execution of the entire transaction. It also appeared that the new limited partnership was created in California in accordance with the provisions of the California Corporations Code, the partnership agreement was negotiated and executed in California and Sibley's guarantee was delivered to the plaintiff in California. 16 Cal.3d at 445.

The Court granted Sibley's motion to quash service of summons upon him for lack of personal jurisdiction. Relying on *Hanson v. Denckla,* 357 U.S. 235, the Court held that Sibley, by his execution and delivery of a personal guaranty, had not purposefully availed himself of the privilege of conducting business in the State of California or of the benefits and protections of California laws.

> "Petitioner was not a party to the MTA Partnership Agreement and took no part in its negotiation. His only connection with the transaction ap-

parent from the record was as guarantor of the performance of the Georgia corporation. Petitioner signed the guaranty agreement in Florida and delivered it to another defendant, Peter Thun, who then took it to California. As indicated, Petitioner is a resident of Florida; he has never been a resident of California, does not own any real estate or personal property in this state, and does not have any business interests or relations with California except as a trustee of a testamentary trust owning property in Cambria, California. Sibley has not been physically present in the state since January 1973, when he was here in connection with a matter unrelated to the transactions before us." 16 Cal. 3d at 445.

* * *

"In the present case, the record fails to disclose that petitioner purposefully availed himself of the privilege of conducting business in California or of the benefits and protection of California laws. Likewise, the record does not indicate that petitioner anticipated that he would derive any economic benefit as a result of his guaranty. Although petitioner may have reasonably foreseen that his execution or breach of the guaranty agreement would have some impact in this state, it does not appear that plaintiff Carlsberg assumed any obligations to petitioner which he might have sought to enforce in California. In this regard, petitioner's contacts with California seem even more minimal than those present in *Belmont Industries, Inc. v. Superior Court* (1973) 31 Cal. App. 3d 281 [107 Cal.Rptr. 237] (Hg. Den.), in which jurisdiction was found to be unreasonable; unlike the present case, in *Belmont,* the non-resident defendant, which had negotiated a contract with a California corporation for the purchase of certain drafting services, could have sought to enforce its contract in the California courts." 16 Cal.3d at 447.

The Court also noted that California had no special interest in assuming jurisdiction over the guaranty transaction even though California residents were involved as plaintiffs, since the guaranty constituted only an ordinary commercial transaction not subject to special regulation by the state.

> "In the matter before us, a California limited partnership, in reliance upon the personal guaranty by a Florida resident, contributed its holdings of Georgia land to a new limited partnership for the purpose of acquiring and operating mobile home parks in Georgia. There are no aspects of this arms-length transaction which are subject to special regulation in California or in which California has otherwise manifested exceptional interest." 16 Cal.3d at 448.

In this regard, the Court specifically distinguished *McGee v. International Life Insurance Co.,* 355 U.S. 220 (1957), where jurisdiction over an out of state insurance company was compelled on the grounds that California had enacted special legislation regulating the activities of foreign insurance companies.

There is no meaningful distinction between the facts of this case and those of *Sibley.* In both cases, the defendants executed guaranties as an accommodation to the respective plaintiffs, and the execution of the guaranties constituted the only significant nexus be-

tween the defendants, the underlying transactions and the State of California.* Sibley was not subject to personal jurisdiction in California. *Hanson v. Denckla,* 357 U.S. 235, compels the same result here.

Other cases have found no "purposeful" conduct by a non-resident defendant who is compelled to undertake some activity in the forum state. In *Aurea Jewelry Creations, Inc. v. Lissona,* 344 F.Supp. 179 (S.D. N.Y. 1972), for example, a non-resident salesman was sued by his employer in New York to recover some property given to him by the employer as samples. The defendant, apparently at the plaintiff's request, had come to New York from California, his place of residence, to sign his employment contract and to pick up the samples. The defendant thereafter made two additional trips to New York, one for the purpose of attending a jewelry show and the other for a discussion with a representative of the plaintiff. During each of these latter two trips, defendant discussed his activities as a salesman with plaintiff's representatives.

Defendant moved to dismiss for lack of personal jurisdiction over him. Plaintiff relied chiefly upon the defendant's execution of the contract in New York in urging that the defendant was subject to the jurisdiction of the New York courts. The District Court granted defendant's motion. In so holding, it focused on the impetus behind the defendant's contacts with New York.

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*Although the *Sibley* court noted that the record failed to disclose whether Sibley expected to derive any economic benefit as a result of his guaranty, presumably he did not assume a large financial obligation gratuitously and as a stranger to either the transaction or the primary obligor. In the present case, petitioner ceased ownership of any interest in Ohio, Inc. in June, 1969, less than one year after his execution of the guaranty (App. 42).

> "The purposeful activity in which the defendant engaged does not evidence a voluntary election to invoke the protection of the laws of New York. To the contrary, it manifests activity by the defendant required of him by the plaintiff." 344 F.Supp. at 182.

As a matter of contract law, courts often recognize a distinction between provisions in a contract arrived at through the give-and-take of negotiation and those provisions which appear in a contract due to the non-negotiable insistence of one party. See, *e.g., Sandnes' Sons, Inc. v. United States,* 462 F.2d 1388, 1392 (Ct. Cl. 1972) (holding the Government's refusal to deal with the plaintiff unless it agreed to certain contract provisions to be violative of due process); *D. H. Overmyer v. Frick Co.,* 405 U.S. 174, 186 (1972) (upholding constitutionality of cognovit note, pointing out that the note was not insisted upon by the respondent).

C. The Holding of the Court Below Is an Unwarranted Expansion of the Scope of Personal Jurisdiction and Will Have an Inimical Effect Upon the Willingness of Non-Residents to Guarantee Interstate Business Transactions.

Because of this case, there is a serious danger that non-residents will be reluctant to involve themselves in any way in transactions in distant states. If by his merely executing a guaranty in his own state, a non-resident will subject himself to litigation and expense on the other side of the country, the risk is clear that interstate commerce will be impeded.

The court below ignored the wisdom of the First Circuit in *Whittaker Corp. v. United Aircraft Corp.,* 482 F.2d 1079, 1085 (1973). The *Whittaker* court dismissed an action against non-resident purchasers of

Massachusetts products for lack of personal jurisdiction over them. The court emphasized the important interest in "not discouraging foreign purchasers from dealing with resident sellers for fear of having to engage in litigation in distant courts." The California courts have also expressed these sentiments. In *Belmont Industries, Inc. v. Superior Court,* 31 Cal.App.3d 281, 289, 107 Cal.Rptr. 237 (1973), the court held that to subject a foreign buyer to the judicial jurisdiction of California by the simple act of its purchasing services from a California resident "would hinder interstate business, contrary to the best economic interest of California." See also, *Fourth Northwestern National Bank v. Hilson Industries, Inc.,* 264 Minn. 110, 117 N.W.2d 732 (1962); *Conn v. Whitmore,* 9 Utah 2d 250, 342 P.2d 871, 874-75 (1975).

II

The California Long-Arm Statute Permits Personal Jurisdiction Over Non-Residents to the "Outer Limits" of Due Process. However, the Decision of the Court Below Erroneously Expands the Scope of Jurisdiction Beyond That Permitted by the State Courts and Invites Plaintiffs to Forum-Shop in the Federal Courts to Obtain Jurisdiction Over Non-Resident Defendants.

The California long-arm statute, CODE OF CIV. PROC. Section 410.10, has been interpreted by both the state and federal courts to provide jurisdiction to the "outer limits" of the state and federal Constitutions. *Threlkeld v. Tucker,* 196 F.2d 1101, 1103 n. 2, *cert. denied,* 419 U.S. 1023 (1974); *Sibley v. Superior Court,* 16 Cal.3d 442, 445, 546 P.2d 322, 128 Cal. Rptr. 34 (1976). The jurisdictional test applied by the California courts is identical to that applied by

the federal courts. *Buckeye Boiler Co. v. Superior Court,* 71 Cal.2d 893, 898-99, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

The *Sibley* decision is only the most recent in a line of California cases which have rejected jurisdiction over a non-resident because of the non-resident's lack of "purposeful" conduct within the state.

In *Belmont Industries, Inc. v. Superior Court,* 31 Cal.App.3d 281, 107 Cal.Rptr. 237 (1973), a California corporation brought suit against a Pennsylvania corporation to recover the value of certain drafting services rendered by the plaintiff in California in connection with a construction project in Maryland. The defendant was engaged in the fabrication and erection of structural steel framework and had telephoned the plaintiff in regard to submitting a bid for a subcontract on drafting work for the project. Some time later, defendant mailed plaintiff a written "purchase order" from Philadelphia, Pennsylvania, to California confirming the award of the contract to plaintiff.

Although defendant's motion to quash service of the summons based upon the court's lack of personal jurisdiction over it was denied by the lower court, the Court of Appeal reversed and granted a writ of mandate. In holding that there was no jurisdiction, the court found that the nature and quality of defendant's activity was not sufficient so that it could be reasonably compelled to defend itself in a California forum.

> "In the case at bench the substance of petitioner's activities with reference to this state was the purchase of drafting services from a resident corporation, by purchase order executed in Pennsylvania. While it was undoubtedly contemplated that Viking would perform the services in California

it was not required by the terms of the contract. The place of Viking's performance was of no concern to petitioner so long as the drawings were prepared on time and in accord with the original plans and specifications. Petitioner's only purpose in entering into the contract was to obtain final drawings at its plant in Pennsylvania, which could be utilized by it in fabricating the steel framework for the Calvert Cliffs job. Viking's performance in California cannot give jurisdiction over petitioner; it is petitioner's activity that must provide the basis for jurisdiction. We find no purposeful activity by petitioner from which it can be inferred that it intended to conduct business in California."

"Although it may be argued that in every instance a state has some interest in providing its residents with a forum for litigation, we are unable to say that California has any substantial interest in providing Viking with a forum to recover payment for its drafting services. [Citation] Viking is a sophisticated business entity that has dealt at arm's length with petitioner on many occasions. Viking's officers have made repeated trips to Pennsylvania for the purpose of negotiating and conferring with petitioner on drafting work. The litigation involves no public interest beyond the rights of the parties. [Citation]." 31 Cal.App.3d at 288 and 289.

In *Tiffany Records, Inc. v. M. B. Krupp Distributors, Inc.*, 276 Cal.App.2d 610, 81 Cal.Rptr. 320 (1964), the plaintiff, a California corporation in the business of selling phonograph records at wholesale, brought suit against thirty-one out-of-state corporations seeking the recovery of money allegedly due in connection with the sale of a large quantity of records to them over a six year period of time. In affirming an order quashing service of process on the defendants, the court characterized the activity of the defendants as follows:

> "There were, in essence, no more than purchases of goods from a California seller by foreign purchasers whose only contact with California was that orders for records were accepted by appellant in California and the records were shipped from California." 276 Cal.App.2d at 615.
>
> . . .
>
> "Respondents conducted no local activities. Their activities were out-of-state, and, at most consisted of the out-of-state placement or receiving of telephone calls, and the mailing of orders. Though such was apparently frequent in some instances, this is not activity within the state, but outside of it, and does not constitute that quality and nature of activity that would make it 'fair' to require any respondent to defend itself here." 276 Cal.App.2d at 619.

See also:

Cornell University Medical College v. Superior Court, 38 Cal.App.3d 311, 113 Cal.Rptr. 291 (1974) (involving the purchase of medical instruments by Cornell University through purchase orders forwarded to California by mail);

Interdyne Co. v. SYS Computer Corp., 31 Cal. App.3d 508, 107 Cal.Rptr. 499 (1973) (no jurisdiction over a New York corporation in an action by a California corporation for the purchase price of computer parts ordered by the defendant after extensive negotiations by phone and mail).

The decision of the court below invites needless forum-shopping and further distorts the underlying policy of the diversity jurisdiction of federal courts. That jurisdiction was originally designed to give a non-resident a fair hearing which he might not have been able to achieve before a partisan state court. However, the decision below will encourage plaintiffs to bring diversity actions in the already heavily burdened federal district courts in California in order to take advantage of the expansion, albeit erroneous, of the limits of personal jurisdiction beyond that which is permitted by California's state courts. The decision creates the potential for a needless increase in the burden on the federal system and should be reversed.

Conclusion.

For the foregoing reasons, petitioner respectfully requests that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX.

Opinion.

In the United States Court of Appeals, for the Ninth Circuit.

Max W. Forsythe, Helen H. Forsythe, E. Bush Hayden and Jean Mulliken, Plaintiffs-Appellees, v. D. H. Overmyer, Defendant-Appellant. No. 75-2855, 76-1780.

Filed: April 17, 1978.

Appeal from the United States District Court for the Northern District of California.

Before: WRIGHT and TANG, Circuit Judges, and THOMPSON, District Judge.*

WRIGHT, Circuit Judge:

Defendant appeals from a judgment for plaintiffs who sued to recover on a personal guaranty. Appellant Overmyer, a New York resident, was chairman of the board and sole stockholder of D. H. Overmyer, Inc. (Ohio) [hereafter Ohio, Inc.], an Ohio corporation. Ohio, Inc., in turn, was the 100% owner of D. H. Overmyer, Inc. (Oregon) [hereafter Oregon, Inc.], an Oregon corporation. Appellant also was the chairman of the board and the chief executive officer of Oregon, Inc. His guaranty of certain obligations of Oregon, Inc. was the subject of the suit.

I.
FACTS

Plaintiffs learned from a California real estate broker that a warehouse in Oregon, owned by Oregon, Inc., was available for sale and lease back. Forsythe indicated some interest in it.

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*Hon. Bruce R. Thompson, of the District of Nevada.

For several days, Forsythe and his attorney met with J. R. Fitzsimmons, an attorney and assistant secretary of Ohio, Inc., parent of Oregon, Inc. As a condition of the proposed purchase and lease, Forsythe insisted that Overmyer personally guarantee performance of Oregon, Inc.'s obligations as lessee. Fitzsimmons telephoned Overmyer in New York to inform him of Forsythe's insistence on a personal guaranty. Overmyer responded by telegram from New York to Forsythe in California, confirming his willingness to give the guaranty. Overmyer then executed the guaranty and forwarded it by mail to Forsythe.

The lease, but not the guaranty, provided that it would be subject to the jurisdiction of California courts and that California law would govern. Oregon, Inc. failed in its obligations as lessee. Late in 1973, Ohio, Inc., along with its numerous subsidiaries, including Oregon, Inc., filed petitions in bankruptcy under Chapter XI. Virtually all Overmyer corporations were in substantial arrears to landlord purchasers.

In October, 1973 plaintiffs sued on the guaranty[1] and, after Overmyer's motion to dismiss for lack of personal jurisdiction was denied, the case went to trial.[2] The court granted judgment for plaintiffs, for $90,-618.17, with 7% interest from the date of judgment and attorney's fees of $11,796.38. On appeal, Overmyer challenges the jurisdiction of the district court.

[1]In a suit against Oregon, Inc., an Oregon state court awarded plaintiffs a judgment for rent, property taxes, interest and attorneys' fees.

[2]Trial was to the court on affidavits.

II.

NO. 75-2855

A. *Jurisdiction.*

Plaintiffs have the burden to establish jurisdiction. *KVOS, Inc. v. Associated Press,* 299 U.S. 269, 278 (1936). Upon a motion to dismiss for lack of personal jurisdiction, the burden varies according to the nature of the pre-trial proceedings in which the jurisdictional question is decided. *Data Disc, Inc. v. Systems Tech. Assoc.,* 557 F.2d 1280, 1285 (9th Cir. 1977). Whatever degree of proof is required initially, a plaintiff must have proved by the end of trial the jurisdictional facts by a preponderance of the evidence.

The jurisdictional inquiry involves a two-step analysis. First, we see if any statute of the state in which the district court sits confers personal jurisdiction over appellant. *See* Fed. R. Civ. P. 4(e). Next, we ascertain whether the state's assertion of jurisdiction accords with principles of due process.

The applicable California statute is § 410.10 of the California Code of Civil Procedure.[3] It has been interpreted to provide that the limits on the jurisdiction of the state's courts are "coextensive with the outer limits of due process under the state and federal constitutions, as those limits have been defined by the United States Supreme Court." *Data Disc, Inc. v. Systems Tech. Assoc., Inc.,* 557 F.2d at 1286 (citations

[3]Cal. Code Civ. Pro. § 410.10:

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

omitted). Thus, the usual two-step analysis collapses into a single search for the outer limits of what due process permits. *Cf. Amba Marketing Systems, Inc. v. Jobar Int'l., Inc.*, 551 F.2d 784, 788-89 (9th Cir. 1977).

A series of decisions, beginning with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), defines the limitations on a state's power to assume *in personam* jurisdiction over an out-of-state defendant. *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957). A defendant must have such "minimal contacts" with the forum that maintenance of the suit will not offend traditional notions of fair play and substantial justice. *Data Disc, Inc.*, 557 F.2d at 1287, *citing International Shoe Co. v. Washington*, 326 U.S. at 316.

When a defendant has "substantial" forum-related activities, he may be subject to the forum state's jurisdiction even as to a suit arising from activities unrelated to the forum. But when his activities are not sufficiently pervasive to support general jurisdiction, the inquiry must turn to an evaluation of his forum-related activities as they relate to the specific cause of action.

Because defendant did not have enough contact with California to support general jurisdiction over him,[4] we must evaluate his contact with the state in his role as guarantor of Oregon, Inc.'s obligations.[5] This

[4]Overmyer's contacts with the forum cannot be fairly characterized as so "substantial" or "continuous and systematic" as to render him generally amenable to the jurisdiction of the California courts. *Data Disc, Inc.*, 557 F.2d at 1287.

[5]Courts have recognized that under California's longarm statute and the due process clause, a defendant may be subject to California jurisdiction when he has caused an effect in that state by an act or omission elsewhere. *Quattrone v. Superior Court*, 44 Cal.App.3d 296, 303, 118 Cal. Rptr. 485, 552 (1975); *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). Jurisdiction properly rests on the "effects" rationale "unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable." *Sibley v. Superior Court*, 16 Cal.3d 442, 446, 128 Cal.Rptr. 34, 36 (1976) (emphasis deleted).

circuit has adopted the following analytical approach to that evaluation:

> (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. (2) The claim must be one which arises out of or results from the defendant's forum-related activities. (3) Exercise of jurisdiction must be reasonable.

Data Disc, Inc., 557 F.2d at 1287 (citations omitted).

The question is whether Overmyer, by guaranteeing the corporation's obligations as lessee of the Oregon warehouse, personally availed himself of the privilege of conducting activities in California so as to invoke the benefits and protections of its laws. In answering the question, we view the facts with a common sense perspective and evaluate carefully the fundamental fairness of the challenged jurisdictional exercise in light of the facts.

> While we have attempted carefully to organize the various legal theories which may be derived from plaintiffs' arguments and the case law in this area, it must be cautioned that questions of personal jurisdiction admit of no simple solutions and that ultimately due process issues of reasonableness and fairness must be decided on a case-

by-case basis. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446, 72 S.Ct. 413, 96 L.Ed. 485 (1952); *Amba Marketing Systems, Inc. v. Jobar Int'l, Inc.*, 551 F.2d 784, 789 (9th Cir. 1977); *Wright v. Yackley*, 459 F.2d 287, 290-91 & n.7 (9th Cir. 1972); *Gardner Eng'r. Corp. v. Page Eng'r. Co.*, 484 F.2d 27, 30-31 (8th Cir. 1973); *Benjamin v. Western Boat Building Corp.*, 472 F.2d 723, 725 (5th Cir.), *cert. denied*, 414 U.S. 830, 94 S.Ct. 60, 38 L.Ed.2d 64 (1973). *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 420, 426 (9th Cir. 1977).

The sale-lease contract between plaintiffs and Oregon, Inc. was negotiated in California, and expressly was subject to interpretation under California law by California courts. Overmyer was not a party to it. He did, however, guarantee Oregon, Inc.'s obligations under it. The guaranty, a separate contract between different parties, was requested as a condition of plaintiffs' assent to the sale-lease agreement. At their request, attorney Fitzsimmons called Overmyer who agreed in his personal capacity to guarantee the corporation's obligations. Although the primary negotiations were between plaintiffs and the corporation, Overmyer participated personally to secure a benefit for his corporation and, indirectly, himself.

An out-of-state act having an effect within the state may be sufficient to support jurisdiction and in such a case we must be particularly careful to assure that the exercise of jurisdiction is reasonable. "The degree to which a defendant interjects himself into the state affects the fairness of subjecting him to jurisdiction." *Data Disc, Inc.*, 557 F.2d at 1288 (citations omitted).

Overmyer, through Fitzsimmons, interjected himself into the transaction by assuming personal liability in the event of default on a contract expressly subject to jurisdiction in the California forum. The guaranty was part of the negotiating strategy in California.[6]

The courts generally respect corporate boundaries in jurisdictional contexts. We held recently that where "[n]othing in the record indicates that the formal separation between parent and subsidiary is not scrupulously maintained[,] . . . the activities of the parent are irrelevant to the issue of jurisdiction over the absent subsidiary." *Uston v. Grand Resorts, Inc.*, 564 F.2d 1217, 1218 (9th Cir. 1977) (citations omitted). *See also Mizokami Bros. v. Baychem Corp.*, 556 F.2d 975, 977 (9th Cir. 1977). Moreover, a corporate officer who has contact with a forum only with regard

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[6]To place the facts of this case in context, and to explain further the fundamental fairness of finding jurisdiction over Overmyer, we note that this dispute does not arise from a single, isolated transaction.

Between 1969 and 1973 Overmyer visited California an average of twice a year to meet with general managers and vice-presidents of his California subsidiaries and to review their operations. Overmyer's corporations listed the California warehouses for sale and lease-back with a real estate brokerage firm, Fox & Carskaden, Inc., in Menlo Park, California, and these brokers negotiated sales and lease-backs of at least thirteen Overmyer warehouses to California residents. D. H. Overmyer, pursuant to the above-described course of business, personally guaranteed performance of his corporations' obligations to ten California residents. Between 1968 and 1973, D. H. Overmyer personally met with the above-named brokers in California several times in connection with the negotiation of these sales and lease-backs. These brokers are the same ones who negotiated the sale and lease-back of the Oregon warehouse involved in this case.

We recognize that a share of Overmyer's California contacts were made in his capacity as a corporate officer. But we note that he regularly involved himself personally in his corporations' ventures by giving his personal guaranty for corporate obligations.

to the performance of his official duties is not subject to personal jurisdiction in that forum. *See Chem Lab Products, Inc. v. Stepanek,* 554 F.2d 371 (9th Cir. 1977).

To affirm the finding of jurisdiction in this case, however, does not require that we dismantle the corporate structure. While Overmyer could have remained behind the multiple veils of his complex business organization, he chose not to do so. As a fair result of that considered business decision, he became subject to jurisdiction in California.[7]

B. *Other Alleged Errors.*

Overmyer's other allegations of error are insubstantial. Having failed to argue the point at trial, he may not object to Forsythe's alleged lack of standing to sue. We note, however, that the persons to whom Forsythe assigned his interests in the lease were properly joined as parties plaintiff. The trial judge held that the appellant had not sustained his burden to prove that plaintiff had a duty to mitigate damages or had failed to do so under the terms of the lease. The record indicates that his conclusion was correct.

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[7]It would defeat reason and common sense to hold that service of process must be quashed simply because Overmyer remained in New York and sent a telegram promising the guaranty, and later the guaranty itself, to the plaintiffs in California or because the guaranty was executed at the request of the plaintiffs.

The guaranty transaction was intimately bound up with the California-based negotiations and Overmyer must have expected, in light of his previous experiences, that the plaintiffs might request a personal guaranty from him as part of the transaction. See note 6, *supra.*

III.
No. 76-1780

In a companion appeal Overmyer challenges the district court's orders directing him to answer post judgment interrogatories and to post a supersedeas bond pending appeal. He has answered the interrogatories and our decision in No. 75-2855 renders relief from the bond requirement unnecessary. The issues in the second appeal have become moot.

IV.
CONCLUSION

The judgment of the district court is affirmed. The appeal in No. 76-1780 is dismissed for mootness.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

Max W. Forsythe, Helen H. Forsythe, E. Bush Hayden and Jean Mulliken, Plaintiffs-Appellees, v. D. H. Overmyer, Defendant-Appellant. No. 75-2855, 76-1780.

Filed: June 16, 1978.

Before: WRIGHT and TANG, Circuit Judges, and THOMPSON, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Wright and Tang have voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Order Denying Motion to Dismiss.

United States District Court, Northern District of California.

Max W. Forsythe, et al., Plaintiffs, vs. D. H. Overmyer, Defendant. No. C-73-1900 LHB.

Filed: April 5, 1974.

Defendant D. H. Overmyer having filed a Motion to Dismiss the above-entitled action; and the same having regularly come on for hearing this day; and the Court having reviewed the Notice of Motion, the Affidavit of D. H. Overmyer in Support of Motion to Dismiss, the Memorandum of Points and Authorities in Support of the Motion to Dismiss, the Memorandum of Points and Authorities in Opposition to Motion to Dismiss, the Affidavit of Max W. Forsythe, the Reply Memorandum of Points and Authorities in Support of Motion to Dismiss, the Supplemental Affidavit of James R. B. Fitzsimmons in Support of Motion to Dismiss, and the Supplemental Memorandum of Points and Authorities in Opposition to Motion to Dismiss; and Dinkelspiel & Dinkelspiel by Douglas G. Boven having appeared on behalf of defendant D. H. Overmyer; and Cullinan, Hancock, Rothert & Burns by Jerome Sapiro, Jr., having appeared on behalf of plaintiffs; the Court having heard argument; and the matter having been submitted; the motion is denied.

Dated: March 29, 1974.

and Signed: April 5, 1974.

/s/ Lloyd H. Burke
Lloyd H. Burke
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

CULLINAN, HANCOCK, ROTHERT & BURNS

By /s/ Jerome Sapiro, Jr.
Jerome Sapiro, Jr.

DINKELSPIEL & DINKELSPIEL

By /s/ Douglas G. Boven*

*Defendant to have 20 days from date of entry of order within which to answer or otherwise respond to the complaint.

Findings of Fact and Conclusions of Law.

United States District Court, Northern District of California.

Max W. Forsythe, et al., Plaintiffs, vs. D. H. Overmyer, Defendant. No. C-73-1900 WHO.

Filed: July 17, 1975.

This action came on regularly for trial before the Court without a jury on May 19 and 27, 1975. The matter having been tried, argued, and submitted, the Court finds for the plaintiffs and makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiffs Max W. Forsythe and Helen Forsythe are and at all times relevant herein have been residents of the City of Menlo Park, State of California. Plaintiff Jean Mulliken is and at all times relevant herein has been a resident of the District of Columbia. Plaintiff E. Bush Hayden is a resident of the State of Oregon.

2. In October, 1968, defendant Daniel H. Overmyer was chairman of the board and sole shareholder of D. H. Overmyer Co., Inc., an Ohio corporation (hereinafter "D. H. Overmyer Co. (Ohio)"), and from December, 1973, to the present date has been president and treasurer of the same. Said defendant was at the commencement of this litigation a resident of the State of New York.

3. In October, 1968, D. H. Overmyer Co. (Ohio) was the sole shareholder of D. H. Overmyer Co., Inc., an Oregon corporation (hereinafter "D. H. Overmyer Co. (Oregon)").

4. At all times from 1964 to the present date, defendant Daniel H. Overmyer has been chairman of

the board and chief executive officer of D. H. Overmyer Co. (Oregon), and from December, 1973, he has been president and treasurer of same.

5. On or about October 14 through 18, 1968, negotiations were conducted by and between plaintiff Max W. Forsythe and John Wilson, Esq., his attorney, on the one hand, and James R. B. Fitzsimmons, who represented himself to be an attorney employed D. H. Overmyer Co. (Ohio), regarding the purchase by plaintiffs of certain real property located in Portland, Oregon, on which stood a warehouse, and for lease of the aforementioned premises back to D. H. Overmyer Co. (Oregon).

6. On October 18, 1968, defendant Daniel H. Overmyer sent to plaintiff Max W. Forsythe a telegram stating that defendant unconditionally guaranteed full performance of each and every obligation under the proposed lease for the first five years of said lease.

7. On or about October 18, 1968, after receipt of the aforementioned telegram, plaintiff Max W. Forsythe entered into agreements of purchase and of lease with D. H. Overmyer Co. (Oregon). The lease to said corporation was for a term of 20 years, commencing on October 18, 1968, at a rent of $7,295.83 per month, payable in advance on the 20th day of each and every month throughout the term of the lease. The tenant also agreed to pay, as additional rent, interest at the rate of 6% per year on all overdue installments of net rent and amounts of additional rent from ten days after the due date thereof until paid in full. Under said lease, D. H. Overmyer Co. (Oregon) also agreed, *inter alia*, to pay as additional rent all taxes which were on October 18, 1968, or thereafter levied, assessed, charged, or imposed against

the lease, the demised premises, or the use or occupation thereof. The lease provides for payment of attorneys' fees and expenses of litigation in the event of litigation arising out of breach of lease by the tenant. The lease gave the lessor, *inter alia*, the right to perform the tenant's obligations as aforesaid in the event tenant failed to perform same and provided that all sums paid by the lessor in performing the tenant's obligations should be repaid by the tenant with interest at the rate of 6% per annum.

8. On October 18, 1968, concurrently with the execution of the aforementioned lease, a guarantee of the performance of the obligations of the tenant was executed by D. H. Overmyer Co. (Ohio).

9. On October 21, 1968, defendant Daniel H. Overmyer executed a formal memorialization of his unconditional guarantee of the performance of the obligations of D. H. Overmyer Co. (Oregon) under the aforementioned lease until October 17, 1973. The same was delivered by mail to plaintiff Max W. Forsythe in Menlo Park, California.

10. On or about October 31, 1968, plaintiff Max W. Forsythe entered into an assignment of the aforementioned lease, pursuant to which he assigned, transferred and conveyed all of his right, title and interest in and to the aforementioned lease to all of the plaintiffs herein.

11. On November 16, 1973, defendant, as chairman of the board of D. H. Overmyer Co. (Ohio) and all of its subsidiary corporations, including but not limited to D. H. Overmyer Co., Inc. (Oregon), filed in the United States District Court, Southern District of New York, 44 petitions in proceedings under Chapter XI of the Bankruptcy Act.

12. On April 8, 1974, plaintiffs were awarded judgment in the Circuit Court of the State of Oregon for the County of Multnomah against D. H. Overmyer Co. (Oregon), for rent, property taxes, interest, and attorneys' fees in the total amount of $107,282.80.

13. In breach of the aforementioned lease, D. H. Overmyer Co., Inc. (Oregon) failed to pay rent for the month of April, 1973, and for every month thereafter until expiration of defendant's guarantee in the total amount of $40,127.07. Interest is owed on said unpaid monthly rent installments at the rate of 6% per annum in the total amount of $4,459.62.

14. In breach of the aforementioned lease, D. H. Overmyer Co., Inc. (Oregon) failed to pay interest on the rent paid tardily at the rate of 6% per annum in the total amount of $1,172.40.

15. In breach of the aforementioned lease, D. H. Overmyer Co., Inc. (Oregon) failed to pay real property taxes on the real property leased to it by plaintiffs in the years 1971, 1972, and 1973, and plaintiffs have paid the same with interest charged by the tax collector of Multnomah County, Oregon, in the total amount of $42,502.39. Interest on the aforementioned tax and interest payments advanced by plaintiffs at the rate of 6% per annum is $2,356.69.

16. Plaintiffs have incurred attorneys' fees and will submit a certificate of counsel setting forth in detail the nature of the services performed and the hours devoted to such services.

17. Defendant has not carried the burden of proof that any payments sought by plaintiffs to be recovered herein are null and void as penalties pursuant to California Civil Code Section 1670.

18. Defendant has not carried the burden of proof that plaintiffs cannot recover herein until distribution may be made in the aforementioned Chapter XI proceedings before the District Court of the United States, for the Southern District of New York, No. 73 BKCY 1154.

CONCLUSIONS OF LAW

1. Jurisdiction of this Court is properly based on the diverse citizenship of the parties and the amount in controversy.

2. The judgment in this action should not be stayed pending the Chapter XI bankruptcy proceedings of the D. H. Overmyer Companies. The Chapter XI proceedings are a personal disability of the principal that do not affect the liability of the defendants in this action. California Civil Code Section 2810. Collier on Bankruptcy, Volume I(a), pages 1537-1539.

3. The guarantee on which plaintiffs sue is, as a matter of law and by its terms, unconditional. *Bank of America v. McRae*, 81 Cal. App. 2d 1, 183 P. 2d 385. California Civil Code Section 2806.

4. Plaintiffs had no absolute duty to proceed against the principal before attempting to recover from the defendant guarantor. California Civil Code Section 2845. *Moffett v. Miller*, 260 P.2d 215.

5. Defendant has failed to meet his burden of establishing that plaintiffs had the obligation and the reasonable opportunity to mitigate damages. *Vitagraph Inc. v. Liberty Theatres, Co.*, 197 Cal. 694 at 699, 242 Pac. 709.

6. Since plaintiffs never terminated the lease of the principal Overmyer company, plaintiffs were not

required to mitigate their damages. California Civil Code Sections 1951.2, 3308.

7. The lease provisions providing for payment of six percent interest as a fee for late payment are not void as a penalty. California Civil Code Section 1670. *Walsh v. Glendale Federal Savings and Loan Association,* 81 Cal. Rptr. 804.

8. Interest for late payments is allowable from the date the underlying payment was due. California Civil Code Section 3287.

9. Defendant is liable for reasonable attorneys' fees since the obligation to pay attorneys' fees is set forth in the lease. *Grace v. Croninger,* 56 Cal. App. 659 at pages 667 and 668.

10. Defendant is indebted to plaintiffs in the amount of $90,618.17 plus interest at the rate of seven percent per annum [sic] from date of entry of judgment until paid.

11. Defendant's affirmative defenses are dismissed.

12. Defendant is indebted to plaintiffs in the amount of reasonable attorneys' fees for services incurred herein.

Let judgment be entered accordingly, the plaintiffs to recover their costs of suit. Plaintiffs will prepare a form of judgment approved as to form by the defendant and submit it within ten days, together with certificate of counsel with respect to the attorneys' fees.

Dated: June 13, 1975;

and signed: July 15, 1975.

/s/ William H. Orrick, Jr.
William H. Orrick, Jr.
United States District Judge

Approved as to form:

CULLINAN, BURNS & HELMER
By
Jerome Sapiro, Jr.
Attorneys for Plaintiffs

DINKELSPIEL & DINKELSPIEL
By
Douglas Boven
Attorneys for Defendant

Judgment.

United States District Court, Northern District of California.

Max W. Forsythe, et al., Plaintiffs, vs. D. H. Overmyer, Defendant. No. C-73-1900 WHO.

Filed: July 17, 1975.

This action came on for trial before the court, the Honorable William H. Orrick, Jr., District Judge, presiding, without a jury on May 19 and 27, 1975, on stipulated facts, and the evidence adduced by the parties having been heard and the matter having been argued by counsel and the court having made its findings of fact and conclusions of law, it is hereby

ORDERED AND ADJUDGED that the plaintiff's Max W. Forsythe, Helen H. Forsythe, E. Bush Hayden and Jean Mulliken recover of the defendant Daniel H. Overmyer the sum of $90,618.17 with interest thereon at the rate of 7% per annum as provided by law and their costs of action and attorneys fees in the amount of $11,796.38.

Dated at San Francisco, California, this 16th day of June, 1975.

/s/ William H. Orrick, Jr.
United States District Judge

Stipulation of Agreed Statement of Facts.

United States District Court, Northern District of California.

Max W. Forsythe, et al., Plaintiffs, vs. D. H. Overmyer, Defendant. No. C-73-1900 WHO.

Filed: May 19, 1975.

The parties hereto agree to present this case on the following stipulation of agreed facts and upon the affidvait of Max W. Forsythe dated May 19, 1975, to be filed concurrently herewith. It is hereby stipulated that said affidavit may be admitted in evidence herein. The aforementioned agreed facts are as follows:

1. Defendant Daniel H. Overmyer was at the commencement of this litigation and now is a resident of the State of New York.

2. In October 1968, defendant Daniel H. Overmyer was chairman of the board and sole shareholder of D. H. Overmyer Co., Inc., an Ohio corporation (hereinafter "D. H. Overmyer Co. (Ohio)"), and at all times since December, 1973, he has been president and treasurer of the same.

3. In October 1968, D. H. Overmyer Co. (Ohio) was the sole shareholder of D. H. Overmyer Co., Inc., an Oregon corporation (hereinafter "D. H. Overmyer Co. (Oregon)").

4. At all times from 1964 to the present, defendant Daniel H. Overmyer has been chairman of the board and chief executive officer of D. H. Overmyer Co. (Oregon), and at all times since he has been president and treasurer of same.

5. On October 18, 1968, defendant Daniel H. Overmyer sent to plaintiff Max W. Forsythe a telegram

stating that defendant unconditionally guaranteed full performance of each and every obligation under the proposed lease for the first five years of said lease. A copy of said telegram is Plaintiffs' Exhibit No. 1 herein.

6. On or about October 18, 1968, plaintiff Max W. Forsythe entered into agreements of purchase and of lease with D. H. Overmyer Co. (Oregon). The lease to said corporation was for a term of twenty (20) years, commencing on October 18, 1968, at a rent of $7,295.83 per month, payable in advance on the 20th day of each and every month throughout the term of the lease. A copy of said lease is Plaintiffs' Exhibit No. 2 herein. The tenant also agreed to pay, *inter alia,* interest, real property taxes, and attorneys' fees and expenses of litigation as set forth in sections 3.01, 3.02, 3.03, 4.01, 11.01, 15.02, 15.04, and 15.08 of said Plaintiffs' Exhibit 2.

7. On October 18, 1968, a guarantee of the performance of the obligations of the tenant was executed by D. H. Overmyer Co. (Ohio) and delivered to plaintiff Max W. Forsythe in Menlo Park, California. A copy of said guarantee is Plaintiffs' Exhibit No. 3 herein.

8. On October 21, 1968, defendant Daniel H. Overmyer executed the personal guarantee. A copy of said guarantee is Plaintiffs' Exhibit No. 4 herein. The same was delivered by defendant Daniel H. Overmyer via mail to plaintiff Max W. Forsythe in Menlo Park, California.

9. On November 16, 1973, defendant, as chairman of the board of D. H. Overmyer Co. (Ohio) and all of its subsidiary corporations, including but not limited to D. H. Overmyer Co., Inc. (Oregon), filed

in the United States District Court, Southern District of New York, 44 petitions in proceedings under Chapter XI of the Bankruptcy Act. The proceeding involving D. H. Overmyer Co. (Ohio) is Bankruptcy No. 73B 1129, and that for D. H. Overmyer Co. (Oregon) is Bankruptcy No. 73B 1154, in said Court.

10. The affidavit of defendant Daniel H. Overmyer in support of his motion to dismiss these proceedings, dated January 21, 1974, may be received in evidence as Defendant's Exhibit B. The affidavit of James R. B. Fitzsimmons, dated March 22, 1974, filed in support of said motion herein may be received in evidence as Defendant's Exhibit C.

11. The affidavit of plaintiff Max W. Forsythe in opposition to the motion of defendant to dismiss this action for lack of venue, dated March 5, 1974, may be received in evidence as Plaintiffs' Exhibit No. 15. The affidavit of Herbert W. Richards, dated March 27, 1974, filed in opposition to defendant's aforementioned motion to dismiss may be received in evidence as Plaintiffs' Exhibit No. 16. The declaration of John P. Wilson, dated March 8, 1974, filed herein in opposition to defendant's aforementioned motion to dismiss may be received in evidence as Plaintiffs' Exhibit No. 17.

12. Plaintiffs' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 13 and 14 may be received in evidence herein.

13. The Court may take judicial notice of plaintiffs' Exhibits 11 and 12.

14. The Court may at trial rule upon the admissibility in evidence, or its ability to take judicial notice, of Plaintiffs' Exhibit No. 10 and Defendant's Exhibit A.

Dated: May 19, 1975.

CULLINAN, BURNS & HELMER
/s/ By Jerome Sapiro, Jr.
Jerome Sapiro, Jr.
Attorneys for Plaintiffs

DINKELSPIEL & DINKELSPIEL
/s/ By Douglas Boven
Douglas Boven
Attorney for Defendant

Affidavit of Max W. Forsythe.

United States District Court, Northern District of California.

Max W. Forsythe, et al., Plaintiffs, vs. D. H. Overmyer, Defendant. No. C-73-1900 WHO.

State of California, County of San Francisco—ss.

Filed: May 19, 1975.

I, Max W. Forsythe, being first duly sworn, say:

1. I am a plaintiff herein, and I make this affidavit pursuant to the agreement between plaintiffs and defendant to present this action for trial upon an agreed statement of facts.

2. Plaintiffs Max W. Forsythe and Helen Forsythe were at the commencement of this litigation and now are residents of the City of Menlo Park, State of California. Plaintiff Jean Mulliken was at the commencement of this litigation and now is a resident of the District of Columbia. Plaintiff E. Bush Hayden was at the commencement of this litigation and now is a resident of the State of Oregon.

3. On or about October 14 through 18, 1968, in the City of Menlo Park, California, affiant and John Wilson, Esq., affiant's attorney, on the one hand, and James R. B. Fitzsimmons, who represented himself to be an attorney employed by D. H. Overmyer Co. (Ohio), on the other hand, conducted negotiations regarding the purchase by plaintiffs from D. H. Overmyer Co. (Oregon) of certain real property located in Portland, Oregon, on which stood a warehouse, and for lease of the aforementioned premises back to D. H. Overmyer Co. (Oregon).

4. Affiant declined to enter into the aforementioned purchase and leaseback with D. H. Overmyer Co. (Oregon) unless the obligations of said corporation under the leaseback were guaranteed both by D. H. Overmyer Co. (Ohio) and by defendant Daniel H. Overmyer.

5. On or about October 18, 1968, after affiant received the telegram, a copy of which is Plaintiffs' Exhibit No. 1, herein, affiant entered into agreements of purchase and of lease with D. H. Overmyer Co. (Oregon). A copy of said lease is Plaintiff's Exhibit No. 2 herein.

6. A guarantee of the performance of the obligations of the tenant dated October 18, 1968, executed by D. H. Overmyer Co. (Ohio), was delivered to affiant on that date in Menlo Park, California. A copy of said guarantee is Plaintiff's Exhibit No. 3 herein.

7. A written unconditional guarantee by defendant Daniel H. Overmyer dated October 21, 1968, was received by affiant in Menlo Park, California, during October, 1968. A copy of said guarantee is Plaintiff's Exhibit No. 4 herein.

8. On or about October 31, 1968, affiant entered into an assignment of the aforementioned lease, pursuant to which he assigned, transferred and conveyed all of his right, title and interest in and to the aforementioned lease to all of the plaintiffs herein. A copy of said assignment is Plaintiff's Exhibit No. 5 herein.

9. In March, 1973, plaintiffs herein filed an action in the Circuit Court of the State of Oregon for the County of Multnomah entitled *Max W. Forsythe, et al., Plaintiffs vs. D. H. Overmyer Co., Inc., an Oregon corporation, Defendant,* being Civil Action No. 389587. Plaintiffs were represented therein by McCarty, Swindells & Nelson, attorneys at law.

10. On April 8, 1974, plaintiffs were awarded judgment in the aforementioned action in the Circuit Court of the State of Oregon for the County of Multnomah against D. H. Overmyer Co. (Oregon), for rent, property taxes, interest, and attorneys' fees in the total amount of $107,282.80. A copy of said judgment is Plaintiff's Exhibit No. 10 herein. Said judgment has not been satisfied in whole or in part.

11. Affiant and affiant's wife, plaintiff Helen Forsythe, have at all times since October 14, 1968, maintained the records of plaintiffs regarding receipts, disbursements, and correspondence relating to plaintiffs' interests in the aforementioned real property.

12. Affiant knows of his own knowledge, and plaintiffs' business records indicate, that plaintiffs have not received rent under the aforementioned lease for the month of May, 1973, or for any month thereafter through expiration of defendant's guarantee, in the total amount of $40,127.07. Interest on said unpaid monthly rent computed to May 19, 1975, at the rate of 6% per annum, is $4,459.62.

13. Affiant knows of his own knowledge, and plaintiffs' business records indicate that, D. H. Overmyer Co. (Oregon) was more than ten days late in making payments of rent by a total of nine hundred seventy-seven (977) days prior to expiration of defendant's guarantee. Attached as Exhibit A and incorporated herein by this reference is a schedule showing the dates plaintiffs received rent payments from D. H. Overmyer Co. (Oregon) from April, 1970, through

October, 1973. Said table has been constructed from entries on payment vouchers and bank deposit records maintained by plaintiffs in the ordinary course of business. Interest on said late payments, at the rate of 6% per annum, computed over that number of days, is $1,172.40.

14. D. H. Overmyer Co. (Oregon) failed to pay real property taxes on the real property leased to it by plaintiffs in the years 1971, 1972 and 1973. Plaintiffs' Exhibit 6 is a true and correct copy of a statement received by plaintiffs from Massachusetts Mutual Life Insurance Co. showing unpaid real property taxes on said real property as of January 8, 1974. Plaintiffs' Exhibit 7 is a true and correct copy of a letter sent by plaintiff Helen W. Forsythe on behalf of all plaintiffs to Mr. Bruce Libby, an employee of Massachusetts Mutual Life Insurance Company, on January 11, 1974. Plaintiffs' Exhibit 8 is a true and correct copy of a statement received in Portland, Oregon, by plaintiffs from the Tax Collector of Multnomah County, Oregon, on or about February 15, 1974, showing real property taxes due on said real property and interest thereon as of February 15, 1974, in the total amount of $42,502.39. Plaintiffs have paid said real property taxes for the years 1971, 1972 and 1973, with interest charged by the Tax Collector of Multnomah County, Oregon, in the total amount of $43,-662.43. Plaintiffs' Exhibit 9 is a true and correct copy of plaintiffs' cancelled checks for said payments. Interest on the aforementioned tax and interest payments advanced by plaintiffs computed at the rate of 6% per annum to May 19, 1975, is $2,356.69.

15. On April 11, 1974, plaintiffs filed Proofs of Claims in the aforementioned proceedings under Chapter XI of the Bankruptcy Act in the matter of D. H. Overmyer Co. (Ohio) and D. H. Overmyer Co. (Oregon).

16. No distribution has been received by plaintiffs, or any of them, from the aforementioned bankruptcy proceedings.

17. No receiver was appointed to manage the warehouse which was the subject of the aforementioned lease prior to the commencement of the aforementioned bankruptcy proceedings, and no rents were collected by plaintiffs, or any of them, from any subtenant of said warehouse prior to rejection of the aforementioned lease by the receiver in the aforementioned bankruptcy proceedings in January, 1974.

18. Affiant's affidavit in opposition to the motion of defendant to dismiss this action for lack of venue, dated March 5, 1974, is incorporated herein by this reference.

19. Plaintiffs incurred and were awarded $7,500 attorneys' fees for services rendered by McCarty, Swindell & Nelson in connection with the aforementioned litigation against D. H. Overmyer Co. (Oregon) in the Circuit Court of the State of Oregon.

20. Affiant is informed by Cullinan, Burns & Helmer, plaintiffs' attorneys in connection with this litigation, that the services rendered by said attorneys and their professional employees on behalf of plaintiffs have involved more than 200 hours of time and out-of-pocket expenses in excess of $250.

Dated: May 19, 1975.

/s/ Max W. Forsythe
Max W. Forsythe

Subscribed and sworn to before me this 19th day of May, 1975.

/s/ Ann Ferguson
Notary Public, State of California

[Seal]

Affidavit of D. H. Overmyer in Support of Motion to Dismiss.

United States District Court, Northern District of California.

Max W. Forsythe, et al, Plaintiffs, vs. D. H. Overmyer, Defendant. No. C-73-1900 LHB.

State of New York, County of New York—ss.

Received: March 5, 1974.

D. H. OVERMYER being first duly sworn, deposes and says:

I am the named defendant in the above-entitled action, and have personal knowledge of the facts set forth herein, and submit this affidavit in support of my motion to dismiss the complaint in this action on the ground that this court lacks jurisdiction over my person or the subject matter of this action.

Now and at all times material hereto, and specifically from a date prior to October of 1968, I have resided in the State of New York, and at no time from said date to and including the present have I resided in the State of California. My place of business at all times material hereto is and has been 201 East 42nd Street, New York, New York.

I executed the guaranty which is attached as Exhibit "B" to the complaint in this action, and did so in New York. I did not execute the guaranty in the State of California, nor did I travel to or participate in any negotiations in California with respect to the guaranty or the lease referred to therein. At no time have I personally transacted business, maintained an office, had a telephone listing, employee, etc. within the State of California.

The said guaranty which is attached to the complaint, on its face, relates to an Oregon corporation, and refers to a lease of real property located in the County of Multnomah, State of Oregon, and does not refer to a California corporation or California real property.

For the foregoing reasons, I respectfully request that this motion in all respects be granted and that this action be dismissed.

/s/ D. H. OVERMYER
D. H. OVERMYER

Subscribed and sworn to before me this 21st day of January, 1974.

/s/ Patricia A. Zuckerman
Notary Public, New York

Reply Affidavit.

United States District Court, Northern District of California.

Max W. Forsythe, et al., Plaintiffs, vs. D. H. Overmyer, Defendant. *Index No.* c-73-1900 WHO.

State of New York, County of New York—ss:

JAMES R. B. FITZSIMMONS, being duly sworn, deposes and says, I am an attorney and counselor at law, admitted to practice in the Courts of the State of New York, and I submit this affidavit in reply to the affidavit of MAX W. FORSYTHE.

In October, 1968, my services were retained by the OVERMEYER corporate organization. I represented the corporations in approximately thirty real estate closings involving sale-lease-back transactions in various parts of the United States. The sale-leaseback transaction between plaintiffs and D. H. OVERMYER CO., INC. a California Corporation, and D. H. OVERMYER CO., INC. (OREGON) was one of these transactions.

Because most of the real estate closings involved similar, if not identical, sale-leaseback transactions, negotiations leading up to and including the actual execution of the documents tended to follow fixed patterns. The transactions between defendants and plaintiffs was one of these transactions.

In none of these real estate closings did I ever state to a purchaser or his attorney that I represented DANIEL H. OVERMYER personally. I was never paid any compensation by the individual DANIEL H. OVERMYER. ~~FORSYTHE'S statement that DANIEL H. OVERMYER wished to give personal~~

~~review to the contracts is not significant with respect to OVERMYER'S personal liability in that~~ DANIEL H. OVERMYER, upon information and belief, was a corporate officer of each of the aforementioned corporate entities.

During many of these closings problems arose which necessitated telephone conferences with corporate headquarters in New York. In practically every such situation, I communicated by telephone with GEORGE HAYS, an Executive Vice President of the corporate organization, and I did not speak with DANIEL H. OVERMEYER personally. Thus, I cannot recall speaking with DANIEL H. OVERMYER personally about his guarantee. However, I emphasize that a personal conference with OVERMYER almost never occurred during the course of these real estate closings.

~~I find it most significant that the detailed narrative of the events leading to the execution of the sale-lease-back transaction is given only by MAX FORSYTHE, the plaintiff in this action and that said narrative is not substantiated by an affidavit from JOHN H. WILSON, plaintiff's personal attorney nor by an affidavit from HERBERT W. RICHARDS, the real estate broker, both of whom were present during the negotiations.~~

/s/ James R. B. Fitzsimmons
JAMES R. B. FITZSIMMONS

Sworn to before me this 22nd day of March, 1974.

/s/ Stanley Alex Schwartz
STANLEY ALEX SCHWARTZ
Notary Public, State of New York
No. 8558055, Qual. in Bronx Co.

[Seal]

Guarantee.

This is a guarantee by D. H. OVERMYER, an individual (hereinafter referred to as "DHO"), to Max W. Forsythe, (hereinafter referred to as "Landlord").

Negotiations between D. H. Overmyer Co., Inc. (Oregon), an Oregon corporation (hereinafter referred to as "Tenant) and Landlord have culminated in the execution, concurrently herewith, of a Lease dated October 18, 1968, between Tenant and Landlord (hereinafter referred to as "The Lease").

In consideration of Landlord entering into The Lease, DHO hereby unconditionally guarantees until October 17, 1973 (hereinafter referred to as "The Guarantee Term") to Landlord the full and prompt payment by Tenant of all sums to be paid, expended and disbursed by Tenant and the full and prompt performance of any of the other covenants and conditions of The Lease at the times and in the manner and mode as provided by The Lease.

This is a continuing guarantee, and shall not be affected by any change, modification, alteration, assignment, renewal, compromise, extension, acceleration or supplement of The Lease or any part thereof. No act or omission on the part of Landlord and no agreement of any kind between Landlord and Tenant shall in any manner or to any extent release or change or modify or affect the obligation and liability of DHO.

This guarantee shall be an independent obligation of DHO and is independent of the obligations and liabilities of Tenant. A separate action or actions may be brought against DHO, irrespective whether action

be brought against Tenant and whether Tenant be joined in any such action or actions.

DHO expressly waives any and all demands and notices of every type, nature, kind and description whatsoever which he might otherwise be entitled by law, including, the following being by way of specification and not by way of limitation; notice of acceptance hereof; protest; presentment; notice of protest; notice of the incurring by Tenant of obligations or liabilities; default; notice of default; or breach of non-payment.

This guarantee shall inure to the benefit of Landlord and its successors and assigns; and shall be binding upon DHO and his heirs, representatives, successors and assigns.

DATED: October 21, 1968.

/s/ D. H. Overmyer
D. H. OVERMYER

/s/ J. R. B. Fitzsimmons
J. R. B. FITZSIMMONS
Witness

Complaint on Continuing Guaranty.

United States District Court, Northern District of California.

Max W. Forsythe, Helen H. Forsythe, E. Bush Hayden and Jean Mulliken, Plaintiffs vs. D. H. Overmyer, Defendants. Civil No. C-73-1900.

Filed: Oct. 25, 1973.

Plaintiffs allege:

1. Plaintiffs MAX W. FORSYTHE and HELEN H. FORSYTHE are residents of the State of California. Plaintiff E. BUSH HAYDEN is a resident of the State of Oregon. Plaintiff JEAN MULLIKEN is a resident of the District of Columbia. Plaintiffs are informed and believe and therefore allege that Defendant D. H. OVERMYER is a resident of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of TEN THOUSAND ($10,000.00) DOLLARS.

2. On or about October 18, 1968, Plaintiff MAX W. FORSYTHE entered into a lease of real property with D. H. OVERMYER, CO., INC., an Oregon corporation, a copy of which is attached hereto marked Exhibit "A" and by reference made a part hereof.

3. On or about October 21, 1968, MAX W. FORSYTHE entered into a written continuing guaranty with D. H. OVERMYER, whereby said individual unconditionally guaranteed to promptly pay to MAX W. FORSYTHE, as landlord, all sums due and payable under the covenants and conditions of the lease dated October 18, 1968. It was further provided that the guaranty shall inure to the benefit of the successors and assigns of the landlord, MAX W. FORSYTHE.

A copy of said guaranty is attached hereto, marked Exhibit "B" and by reference made a part hereof.

4. On or about October 31, 1968, MAX W. FORSYTHE executed an ASSIGNMENT OF LEASE whereby he transferred all of his right, title and interest in and to the lease dated October 18, 1968 (attached hereto as Exhibit "A") to E. BUSH HAYDEN, JEAN MULLIKEN and HELEN H. FORSYTHE, a copy of said Assignment of Lease is attached hereto, marked Exhibit "C" and by reference made a part hereof.

5. By the terms of the lease dated October 18, 1968, there is now due, owing and unpaid from D. H. OVERMYER, CO., INC., to Plaintiffs the sum of Fifty-One Thousand Seventy Dollars Eighty-One Cents ($51,070.81) for rent; interest at the rate of 6% per annum as computed on the delinquent monthly payments as set forth in the lease, said interest presently exceeds One Thousand Dollars ($1,000.00); the sum of Forty-Seven Thousand Three Hundred Twenty Dollars and Twenty-Four Cents ($47,320.24) for unpaid real property taxes for 1971-1973, and interest thereon, which currently amounts to in excess of Four Thousand Five Hundred Dollars ($4,500.00). Said sums amount to in excess of One Hundred Three Thousand Dollars ($103,000.00). Although demand has been made on both D. H. OVERMYER CO., INC., and D. H. OVERMYER, individually, each of said parties has refused to pay the sums due, or any part thereof, all to Plaintiffs' damage. Plaintiff asks leave to amend this pleading at the time of trial to set forth the exact balance due from defendant.

6. Section 15.08 of the lease provides that in the event tenant shall be in default in the performance

of any obligation under the lease and an action is brought for the enforcement thereof in which it is determined that tenant was in default, tenant shall pay to landlord all expenses incurred in connection therewith, including reasonable attorney's fees. Plaintiffs have been required to hire attorneys to enforce their claim and reasonable attorneys fees to date is the sum of Seven Thousand Five Hundred Dollars ($7,500.00).

WHEREFORE, Plaintiffs demand judgment against Defendant in the sum of Fifty-One Thousand Seventy Dollars and Eighty-One Cents ($51,070.81) as rent, interest at the rate of six (6%) percent per annum on the delinquent monthly rental payments, Forty-Seven Thousand Three Hundred Twenty Dollars and Twenty-Four Cents ($47,320.24) for delinquent real property taxes, and the interest accrued thereon, together with costs reasonable attorneys fees and expenses incurred in connection with this litigation.

Dated: October 24, 1973.

/s/ Timothy C. Wright
Attorney for Plaintiff

Notice of Motion and Motion to Dismiss.

United States District Court, Northern District of California.

Max W. Forsythe, et al, Plaintiffs, vs. D. H. Overmyer, Defendant. No. C-73-1900 LHB.

Filed: January 28, 1974

TO PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD, TIMOTHY C. WRIGHT, ESQ. AND JOHN P. WILSON, ESQ.:

PLEASE TAKE NOTICE that on Friday, February 15, 1974, at 11:00 a.m. or as soon thereafter as the matter can be heard in Courtroom No. 6, U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, California, before Honorable Lloyd H. Burke, U.S. District Judge, defendant will move the Court for its order dismissing this action.

This motion is made on the ground that the Court lacks jurisdiction over the defendant, and is based on this notice, the pleadings, records and files in this action, the attached affidavit and memorandum of points and authorites, and such further oral and documentary evidence as may be presented at the hearing of this motion.

Dated: January 24, 1974.

DINKELSPIEL & DINKELSPIEL
/s/ By Bruce W. Belding
Bruce W. Belding
Attorneys for Defendant

MEMORANDUM OF
POINTS AND AUTHORITIES

1. The defense of "lack of jurisdiction over the person" may be raised by motion.

Rule 12(b), Federal Rules of Civil Procedure

2. A mandatory prerequisite to establishing jurisdiction is that there be certain "minimum contacts" between the non-resident defendant and the state seeking to exercise jurisdiction.

International Shoe v. Washington, 326 U.S. 310 (1944);

California Code of Civil Procedure, Section 410.10, applicable per *Arrowsmith vs. United States International*, 320 F.2d 219 (2d Cir. 1963).

3. In this case the necessary "minimum contacts" are lacking. Plaintiff alleges that he leased certain Oregon real property to an Oregon corporation, and that defendant, admittedly a New York resident, guaranteed the lease (Complaint, ¶1, 2 and 3). The guaranty was signed in New York, and defendant personally had *no activity in California* in connection with this action (D. H. Overmyer Affidavit). Therefore, defendant urges that plaintiff's attempt to predicate jurisdiction based solely on plaintiffs' California residence be rejected, and that this motion be granted.

Dated: January 24, 1974

Respectfully submitted,
DINKELSPIEL & DINKELSPIEL
/s/ By Bruce W. Belding
Bruce W. Belding
Attorneys for Defendant

Answer to Plaintiffs' First Interrogatories to Defendant Filed Nov. 25, 1974.

* * *

INTERROGATORY NO. 2

State whether you are now or have ever been an officer, director, shareholder or employee of (a) Overmyer, Inc. (Ohio); (2) D. H. Overmyer, Inc. (Oregon); or (c) Overmyer Distributing Company.

RESPONSE TO INTERROGATORY NO. 2

(a) Officer, director, shareholder, and employee.

(b) Officer, director, shareholder, and employee.

(c) Officer, director, shareholder, and employee.

* * *

INTERROGATORY NO. 4:

For each entity named in Interrogatory No. 2 in which you are a shareholder, state:

(a) The number of shares you own or have owned since January 1, 1967;

(b) The percentage of total shares you now own or have owned since January 1, 1967; and

(c) The inclusive dates of your ownership of such shares.

RESPONSE TO INTERROGATORY NO. 4

(a) 8 shares of D. H. Overmyer, Inc. (Ohio); no shares of D. H. Overmyer Co., Inc. (Oregon); 10,000 shares of Overmyer Distribution Services, Inc.

(b) 100% of D. H. Overmyer, Inc. (Ohio). No shares of D. H. Overmyer Co., Inc. (Oregon). .001% of Overmyer Distribution Services, Inc.

(c) To June 18, 1969, with respect to D. H. Overmyer Co., Inc. (Ohio). From May, 1971, to date with respect to Overmyer Distribution Services, Inc.

* * *

Affidavit of Max W. Forsythe.

I, MAX W. FORSYTHE, being duly sworn, say:

1. I am one of the plaintiffs in the above-entitled action, and I make this affidavit in opposition to the motion of defendant Daniel H. Overmyer to dismiss this action for lack of venue.

2. During or about the month of October, 1968, affiant was told by Herbert W. Richards, a real estate broker employed by Fox & Carskadon, Inc., in Menlo Park, California, that D. H. Overmyer Co., Inc., was offering for sale and leaseback a warehouse and office located at 19241 N. E. San Rafael Street and N. E. 192 Street, Portland, Oregon, a warehouse and office. Mr. Richards offered to put me in touch with a representative of D. H. Overmyer Co., Inc., in Menlo Park, California, to discuss details of the potential investment.

3. After some preliminary investigation of D. H. Overmyer Co., Inc., and of the aforementioned warehouse and office, affiant concluded that affiant and his family would be interested in the possibility of the proposed purchase and leaseback, but only upon certain terms and conditions.

4. During both affiant's preliminary investigation of D. H. Overmyer Co., Inc., and the negotiations with attorney James R. B. Fitzsimmons, affiant learned that defendant Daniel H. Overmyer controlled and dominated D. H. Overmyer Co., Inc. (Ohio) and its subsidiaries, was the sole shareholder thereof, and was chairman of the board not only of D. H. Overmyer Co., Inc. (Ohio) and D. H. Overmyer Co., Inc. (Oregon), but also of D. H. Overmyer Co., Inc., a California corporation wholly owned by the Ohio corporation. Indeed, attorney James R. B. Fitzsimmons advised both

me and my attorney that he could not commit any of the aforementioned corporations or defendant Daniel H. Overmyer to enter into any sale or leaseback or guarantee without the express, personal approval of defendant Daniel H. Overmyer.

5. Because I understood that defendant Daniel H. Overmyer wholly dominated and controlled the companies which bear his name, I decided that my family and I would not enter into the proposed purchase and leaseback unless defendant Daniel H. Overmyer personally guaranteed the performance of the terms and conditions of the purchase and leaseback by D. H. Overmyer Co., Inc. (Ohio), and by D. H. Overmyer Co., Inc. (Oregon). I requested my personal attorney, John P. Wilson, of Menlo Park, California, to review the proposed transaction. Mr. Wilson and I met in the law offices of John P. Wilson, at 1075 Curtis Street, Menlo Park, California, with the aforementioned Herbert W. Richards and with one James R. B. Fitzsimmons, whom I understood to be an attorney at law representing D. H. Overmyer Co., Inc. (Ohio), and D. H. Overmyer Co., Inc. (Oregon), and defendant Daniel H. Overmyer. Our negotiations were conducted in Menlo Park, California, on or about October 14, 15, 16, 17, and 18, 1968. During the negotiations, the aforementioned James R. B. Fitzsimmons made several telephone calls to Daniel H. Overmyer in which said James R. B. Fitzsimmons obtained the agreement of his client personally to guarantee performance of each and every obligation by D. H. Overmyer Co., Inc. (Ohio), and of D. H. Overmyer Co., Inc. (Oregon), for a lease of the aforementioned premises. Defendant Daniel H. Overmyer, through his attorney James R. B. Fitzsimmons, however, refused to commit himself

to such guarantee for a longer period than five (5) years.

6. On October 18, 1968, defendant Daniel H. Overmyer confirmed his commitment to guarantee performance of the leasehold obligations as aforesaid by a telegram addressed to affiant in care of the aforementioned Herbert W. Richards in Menlo Park, California. A copy of said telegram is attached hereto as Exhibit 1 and, by this reference, incorporated herein.

7. Following receipt of the aforementioned telegram, and in reliance thereon, affiant entered into the lease of real property with D. H. Overmyer Co., Inc. (Oregon), a copy of which is attached to the Complaint herein as Exhibit A.

8. On October 18, 1968, subsequent to my receipt of the aforementioned personal guarantee of Daniel H. Overmyer, my attorney John P. Wilson, and James R. B. Fitzsimmons, the attorney for defendant Daniel H. Overmyer and for D. H. Overmyer Co., Inc. (Ohio) and for D. H. Overmyer Co., Inc. (Oregon), called the Portland, Oregon, office of Pioneer National Title Insurance Company and remained in constant contact with that office until the deed from D. H. Overmyer Co., Inc. (Oregon), to affiant was recorded on October 18, 1968. Affiant thereupon signed the lease, a copy of which is attached as Exhibit A to the Complaint herein, and executed a personal check in the amount of $340,000.00 in favor of D. H. Overmyer Co., Inc., a copy of which is attached as Exhibit B to the Complaint herein. Affiant, attorney John P. Wilson, attorney James R. B. Fitzsimmons, and Herbert W. Richards thereupon walked to affiant's bank, the Menlo Park Branch of the Bank of America at 633 Santa Cruz

Avenue, Menlo Park, California, where attorney James R. B. Fitzsimmons cashed the aforementioned check and paid a brokerage commission to Herbert W. Richards.

Executed at Menlo Park, California, this 5th day of March, 1974.

/s/ Max W. Forsythe
MAX W. FORSYTHE

Subscribed and sworn to before me this 5 day of March, 1974.

/s/ Ethel Enole
Notary Public
Seal

Affidavit of Herbert W. Richards.

I, HERBERT W. RICHARDS, being duly sworn, say:

1. During the year 1968 and at all times since then, I have been an employee of Fox & Carskaden, Inc., California real estate brokers, having my office in Menlo Park, California. During 1968 and subsequently, D. H. Overmyer Co., Inc., of which defendant Daniel H. Overmyer is President, sent to my employer listings of warehouse buildings which that company was offering for sale. I, personally, have met with defendant Daniel H. Overmyer in California several times since 1967 in connection with the business of D. H. Overmyer Co., Inc., or its subsidiaries. My employer and I have acted as brokers in the sale and leaseback of at least thirteen (13) Overmyer warehouses to California residents.

2. During 1968, I became aware that D. H. Overmyer Co., Inc., was offering for sale and leaseback a warehouse and office located at 19241 N. E. San Rafael Street and N. E. 192 Street, Portland, Oregon. I notified plaintiff Max W. Forsythe of that listing. During the month of October, 1968, I participated in negotiations in Menlo Park, California, which led up to the execution of the agreements of sale and leaseback of said warehouse between D. H. Overmyer, Inc., (Ohio), D. H. Overmyer, Inc., (Oregon), and plaintiffs herein.

3. Max W. Forsythe, one of the plaintiffs herein, and attorney John P. Wilson, representing plaintiffs, directly participated in the aforementioned negotiations.

4. Attorney James R. B. Fitzsimmons purported to represent both defendant Daniel H. Overmyer and

D. H. Overmyer Co., Inc. (Ohio), and its subsidiaries, in the aforementioned negotiations. My understanding that he represented defendant Daniel H. Overmyer, individually, was reinforced by the statement made by said James R. B. Fitzimmons that he could not commit defendant Daniel H. Overmyer to, or enter into, any guarantee of the performance of the lease between plaintiffs and D. H. Overmyer Co., Inc. (Oregon), without the express, personal approval of defendant Daniel H. Overmyer. The aforementioned James R. B. Fitzimmons had one or more telephone conferences with defendant Daniel H. Overmyer after which said James R. B. fitzimmons represented that he had obtained the agreement of his client personally to guarantee the performance of each and every obligation by D. H. Overmyer Co., Inc. (Ohio), and of D. H. Overmyer Co., Inc. (Oregon), for a lease of the aforementioned premises.

5. On October 18, 1968, defendant Daniel H. Overmyer confirmed his commitment to guarantee performance of the leasehold obligations as aforesaid by a telegram addressed to plaintiff Max W. Forsythe in care of me at my office in Menlo Park, California. A copy of said telegram is attached hereto as Exhibit A and, by this reference, incorporated herein. I delivered said telegram to plaintiff Max W. Forsythe, and, following receipt of that telegram, plaintiff Max W. Forsythe entered into the lease of real property with D. H. Overmyer Co., Inc. (Oregon), dated October 18, 1968.

6. After the deed from D. H. Overmyer Co., Inc. (Oregon), to plaintiff Max W. Forsythe was recorded on October 18, 1968, Max W. Forsythe signed the

lease dated October 18, 1968, and gave a personal check in the amount of Three Hundred Forty Thousand Dollars ($340,000.00) in favor of D. H. Overmyer Co., Inc., to attorney James R. B. Fitzimmons. Affiant, attorney John P. Wilson, attorney James R. B. Fitzimmons, and plaintiff Max W. Forsythe therefore walked to the Menlo Park Branch of the Bank of America at 633 Santa Cruz Avenue, Menlo Park, California, where attorney James R. B. Fitzimmons cashed the aforementioned check and paid to affiant a brokerage commission.

Executed at Menlo Park, California, this 27th day of March, 1974.

/s/ Herbert W. Richards
HERBERT W. RICHARDS

State of California, County of San Mateo—ss.

Subscribed and sworn to before me this 27th day of March, 1974.

/s/ Virginia M. Finney
Notary Public
in and for the State of
California

My commission expires: Nov. 30, 1975.
[Seal]

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of July, A.D. 1978.

_____

_____

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1978

No. 78-141

D. H. OVERMYER,
Petitioner,

vs.

MAX W. FORSYTHE, HELEN H. FORSYTHE,
E. BUSH HAYDEN and JEAN MULLIKEN,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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A BOWNE COMPANY

Subject Index

Table of Authorities Cited

In the Supreme Court
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QUESTION PRESENTED

Petitioner misstates the nature of the legal issue, or issues, sought to be reviewed. The issue is whether, in a diversity action on a guaranty of performance of a lease, a court in California may reasonably exercise personal jurisdiction over a nonresident defendant where the lease and guaranty were negotiated in California; the guaranty was made in California by

delivery in California to a California resident; the lease and the guaranty were subject to the jurisdiction of courts and the laws of California; the leasehold obligations were, in part, to be performed in California; 100% of the stock of the lessee was owned by a corporation which, in turn, was wholly owned by petitioner; petitioner's guaranty was part of a series of substantially identical transactions with California; the defalcations of petitioner and his corporations caused damage to California residents; and petitioner had many other substantial business contacts with California.

Petitioner's second purported question is moot because the decision of the Ninth Circuit is totally consistent with the scope of jurisdiction permitted by California courts.

STATEMENT OF THE CASE

Petitioner and many corporations bearing his name (Appendix D)[1] have long been engaged in the nationwide enterprise involving the sale and leaseback of warehouses. This enterprise was described in the opinion of The Honorable Roy Babitt, Bankruptcy Judge, dated July 23, 1974, aff'd *In re D. H. Overmyer Co., Inc.*, 510 F.2d 329 (2d Cir. 1975) (Appendix A):

[1]References to Appendix ..... are to the Appendix to this brief. References to A. ..... are to the Appendix to petitioner's brief which omits many matters which were before the District Court and the Ninth Circuit, some of which are in the Appendix hereto.

The debtor is engaged in the business of long term leasing of warehouse space from landlords under lease-back arrangements and short term subleasing of such space to subtenants at rentals in excess of that payable by the debtor to its landlord under the lease-back. This business began when the debtor purchased parcels of land and arranged for the financing necessary for it in order to construct a warehouse on the land. In the finished structure, the debtor would lease space to others or operate a public warehousing enterprise for itself. When the newly constructed warehouses had thus become viable, the land and buildings were sold to an investor subject, of course, to the outstanding encumbrances. Under the terms of the sale, the debtor would take back a lease from the purchaser in a typical lease-back situation, and the debtor would continue to operate the warehouses, collecting from the subtenants the rents called for by the leases between the debtor and the subtenants while the debtor would pay to the landlord-purchaser the amounts reserved by the sale and lease-back instruments. In the lease-backs the typical lease was a net-net lease whereby the landlord-purchaser was to receive fixed rent from the debtor during the life of the lease, the term of which was usually in the vicinity of 30 years including two option periods, but with a reduced rent to be paid by the debtor during those option periods. Under the net-net leases, the debtor, as tenant was obliged to maintain the property and usually to pay all real estate and other taxes as well as mortgage payments. It is noted herein that while the lease between the debtor and the landlord-purchaser covered, with the options, a rather extensive period of time, the

> debtor's subleases with subtenants occupying the warehouse facilities were for short terms, and the total of the rents were in excess of the amount due for landlord-purchaser under the terms of the sale and lease-back to the debtor. (Footnotes omitted)

By this program of construction, sale, and lease-back, petitioner built a complex and widespread warehousing enterprise which was once described to this Court as "having built 'in three years . . . 180 warehouses in thirty states.'" *D. H. Overmyer v. Frick Company,* 405 U.S. 174, 179 (1972). There, the corporate parent was described succinctly:

> Overmyer is a corporation. Its corporate structure is complicated. Its activities are widespread. As its counsel in the Ohio post-judgment proceedings stated, it has been party to "tens of thousands of contracts with many contractors."

Id., at 186.

Petitioner was the chairman of the board and sole shareholder of D. H. Overmyer Co., Inc., an Ohio corporation. That corporation, in turn, was the sole shareholder of numerous subsidiaries, each bearing the name "D. H. Overmyer Co., Inc." (Appendix D) Petitioner was employed by many foreign and domestic corporations.

Petitioner periodically visited California in connection with those business operations. From 1967 to 1973, he visited the State of California an average of twice per year in his capacity as chairman of the board and chief executive officer of D. H. Overmyer Co., Inc. (California). (Appendix E)

While in California, petitioner met several times with Herbert W. Richards, a real estate salesman, in connection with the business of various Overmyer corporations. Mr. Richards and his employer, Fox & Carskadon, Inc., acted as brokers in the sale and leaseback to California residents of at least thirteen Overmyer warehouses. (A. 47) Petitioner personally guaranteed the obligations of Overmyer subsidiaries to not less than ten California residents. (Appendix F)

In October, 1968, D. H. Overmyer Co., Inc. (Ohio) offered for sale and leaseback a warehouse located in Portland, Oregon. Dr. Forsythe learned of this warehouse from Mr. Richards. Negotiations took place in the offices of Dr. Forsythe's personal attorney, located in Menlo Park, California. Dr. Forsythe, Mr. Richards, Dr. Forsythe's attorney, and an attorney named James R. B. Fitzsimmons conducted the negotiations. Mr. Fitzsimmons purported to represent not only the petitioner but also D. H. Overmyer Co., Inc. (Ohio), and its subsidiaries. (A, 44-49. Appendix H)[2] At a number of points during the negotiations, Mr. Fitzsimmons consulted by telephone with petitioner regarding negotiations. *(Ibid.)*

Those negotiations resulted in the sale of a warehouse from D. H. Overmyer Co., Inc. (Ohio) to Dr. Forsythe and the leaseback of that warehouse to the Oregon subsidiary. (A. 21-22) Dr. Forsythe refused to enter into the proposed sale and lease-back unless

[2]Petitioner's comments regarding the status of attorney Fitzsimmons are cunning. Neither Mr. Fitzsimmons nor petitioner ever actually denied to the District Court that Mr. Fitzsimmons represented petitioner.

petitioner personally guaranteed the performance of all of the obligations of the Oregon subsidiary. (A. 25, 26. Appendix H) Petitioner unconditionally agreed to guarantee the performance of those obligations for the first five years of the proposed lease. (A. 35) Petitioner confirmed this commitment by sending a telegram addressed to Dr. Forsythe, c/o Mr. Richards, in Menlo Park, California. (A. 45, para. 6; 48, para. 5) On October 21, 1968, petitioner executed his unconditional guaranty, and the guaranty was delivered to Dr. Forsythe in Menlo Park, California, by mail. (A. 26)

Upon receipt of the aforementioned telegram in California, Dr. Forsythe entered into the agreements of purchase and lease. The lease was for a term of twenty years, commencing on October 18, 1968, at a rent of $7,295.83 per month, payable to the lessor in California. (A. 27) The lease explicitly stated that it was the specific understanding of the parties that it was entered into in the State of California and that it would in every respect be subject to the jurisdiction of the courts of the State of California and be interpreted in accordance with the laws of the State of California. (Appendix C)

The Oregon subsidiary breached the lease. (A. 16) On October 25, 1973, petitioner was sued on his guaranty in the United States District Court for the Northern District of California. Subject matter jurisdiction was invoked pursuant to the doctrine of diversity of citizenship. (A. 37-39) Petitioner's motion to dismiss for lack of jurisdiction was denied by the District Court. (A. 11-12)

The only discovery before trial in the District Court was by interrogatory. (Appendix B) Petitioner took no discovery, and neither side took depositions. The matter was tried, on a stipulation of agreed statement of facts filed May 19, 1975, before The Honorable William H. Orrick, Jr., United States District Judge. (A. 20-24)

Judgment for respondents was entered on July 21, 1975, in the principal amount of $90,618.17, plus interest at the rate of 7% per annum, with attorneys fees in the amount of $11,796.38. (A. 20) The Ninth Circuit affirmed. (A. 1-9)

ARGUMENT

In *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), involving the amenability to process in a Washington court of an out-of-state corporation which was not doing business within the state, this Court set forth the modern approach to questions of personal jurisdiction:

> . . . But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Id., at 316. This test is not a mechanical one, but rather goes to the basic fairness of the court's assertion of power over the defendant. *Id.*, at 319.

I

THE CONTRACT AND GUARANTY HERE HAVE MORE THAN A SUBSTANTIAL CONNECTION WITH CALIFORNIA

The decisions of the District Court and the Ninth Circuit are consistent with such decisions of this Court as *Hanson v. Denckla,* 357 U.S. 235 (1958), *Perkins v. Benguet Consolidated Mining Company,* 342 U.S. 437 (1952); and *Travelers Health Association v. Virginia,* 339 U.S. 643 (1950). As stated in *McGee v. International Life Insurance Company,* 355 U.S. 220, 223 (1957), "It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with [the forum] State." *Id.*, at 223. There, the nonresident defendant had only one contact with the State of California, namely the contract of insurance upon which it was sued. No agent or representative of the defendant was ever in the State of California. Nevertheless, the minimum contacts criterion was satisfied. A "substantial connection" with California was established, since "[t]he contract was delivered in California, the premiums were mailed from there and the insured was a resident of the State when he died." *Ibid.*

The contract and guaranty involved here not merely satisfy, but clearly exceed, the substantial

connection with California which is required by the foregoing cases.

A. The contract and guaranty were made in California.

In *McGee, supra,* the insurance contract was merely delivered to a California resident in California. The contacts here, however, were significantly stronger. The guaranty, signed by petitioner in New York, was delivered by mail to Dr. Forsythe in California. All of the negotiations which preceded the purchase and leaseback occurred in Menlo Park, California. Attorney Fitzsimmons actively participated in those negotiations and purported to represent both appellant and his corporations. Dr. Forsythe refused to execute the lease in favor of petitioner's corporations unless petitioner personally guaranteed the performance of the leasehold obligations. During the negotiations, Mr. Fitzsimmons had several telephone conversations with petitioner, one of the results being petitioner's guaranty. (*E.g.,* A. 43-49) Both the confirming telegrams and the formal guaranty were delivered to Dr. Forsythe in Menlo Park, California. (A. 2, 14-15, 20-22)

A guaranty becomes a binding contract only at the time and place of its delivery. *See, e.g., Skaggs-Stone v. Labatt,* 182 Cal.App.2d 142, 5 Cal.Rptr. 88 (1960). Therefore, petitioner's guaranty only became a contract by delivery in the State of California.

Thus, every significant aspect of the negotiations and delivery of both the underlying contract and petitioner's guaranty took place in the Northern Dis-

trict of California. The history of the formation of these contracts bears a much stronger connection with California than did the contract in *McGee*.

B. The underlying lease was specifically subjected to the jurisdiction of the California courts and the laws of that State.

The underlying lease made clear the parties' intention both that the agreement be interpreted according to California law and that it be subject to the jurisdiction of the California courts "in every respect." (Appendix C) Petitioner did not merely guarantee the payment of rent. He unconditionally guaranteed:

> . . . to Landlord the full and prompt payment by Tenant of all the sums to be paid, expended and disbursed by Tenant and the full and prompt performance of any of the other covenants and conditions of The Lease at the times and in the manner and mode as provided by The Lease.

(A. 35)

Since the tenant's obligations were to be determined under California law, and petitioner unconditionally guaranteed the performance of all of the covenants and conditions in the manner and mode provided by the lease, petitioner's own obligations were necessarily subject to California law. He clearly availed himself of the benefits and protections of California law because both the breach of and the limitations upon his duties were to be determined by California law, and the jurisdictional clause selected California as the appropriate forum.

C. The obligation was to be performed in California.

The underlying lease obligation required that the tenant pay rent to the landlord in California. (Appendix G) Petitioner's unconditional guaranty o fthis obligation obligated him to perform in California. His defaults caused damage in California.

II

EVEN IF THERE WERE NO CONTACTS BY PETITIONER WITH CALIFORNIA OTHER THAN THE GUARANTEE SUED UPON HERE, CALIFORNIA WOULD HAVE IN PERSONAM JURISDICTION

Numerous cases have upheld the assertion of long-arm jurisdiction over out-of-state defendants where a single, noninsurance contract was involved and in which the contacts of the defendant with the forum were substantially less than petitioner's contacts with California. *E.g., Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280 (9th Cir. 1977); *Ameron v. Anvil Industries, Inc.*, 524 F.2d 1144 (9th Cir. 1975); *Gardner Engineering Corp. v. Page Engineering Corp.*, 484 F.2d 27 (8th Cir. 1973); *Jones Enterprises, Inc. v. Atlas Service Corporation*, 442 F.2d 1136 (9th Cir. 1971); *Thompson v. Ecological Science Corporation*, 421 F.2d 467 (8th Cir. 1970); *Electro-Craft Corp. v. Maxwell Electronics Corp.*, 417 F.2d 365 (8th Cir. 1969); *Washington Scientific Indus., Inc. v. Pollan Indus., Inc.*, 273 F.Supp. 344 (D. Minn. 1967); *Seilon Incorporated v. Brema S.p.A.*, 271 F. Supp. 516 (N.D. Ohio 1967); and *Waukesha Building*

Corporation v. Jameson, 246 F.Supp. 183 (W.D. Ark. 1965).

The decision of the Ninth Circuit is consistent with decisions of the California courts that *in personam* jurisdiction may attend to even an isolated, noninsurance transaction connected with the state. See, *e.g.*, *Michigan Nat. Bank v. Superior Court*, 23 Cal.App.3d 1, 99 Cal.Rptr. 823 (1972), where the court held that there was personal jurisdiction over an out-of-state bank which had refinanced the purchase of an aircraft located in California, because:

> . . . the contract was delivered in California, the [bank] undertook the dealer-seller's obligations under the chattel mortgage, the payments such as were made were to be remitted from California, and upon performance, or excuse from performing, the real party in interest was entitled to receive clear title to the airplane in this state.

Id., 23 Cal.App.3d at 6. See, also, *Ault v. Dinner for Two, Inc.*, 27 Cal.App.3d 145, 103 Cal.Rptr. 572 (1972).

While the substantial connection to California of the contract and petitioner's guaranty is sufficient for personal jurisdiction, there are numerous other factors which make the decision of the Ninth Circuit incontrovertible.

A. Petitioner's default caused damage to California residents.

Petitioner and his corporations solicited investments from numerous California residents, including respondents. They entered into contractual relationships with respondents. (A. 7 n. 6, 8 n. 9) The foreseeable consequences of the breach of those contracts included damage to California residents. California therefore has personal jurisdiction over appellant. *McGee v. International Life Ins. Co., supra.* Restatement (Second) Conflict of Laws, § 37 (1971).

B. Petitioner had a strong pecuniary interest in executing the guaranty.

Petitioner owned 100% of the outstanding stock of the parent corporation of the principal obligor under the lease, and he was the progenitor of a multitude of other corporations which were part of an international empire. Petitioner had a beneficial interest in the profits which D. H. Overmyer Co., Inc. (Ohio) and (Oregon) would reap as a result of the sale and leaseback. But for petitioner's guaranty, the transaction would not have occurred. Clearly, petitioner executed the guaranty for his own pecuniary gain. As a direct result, corporations wholly owned by him obtained substantial money. (A. 47-48) It is only reasonable that, after both the default of corporations and petitioner's own default, he should respond in the jurisdiction in which the agreements were made, in which persons to whom the obligations are owed reside, and in which the agreements were to be performed. As was stated in Restatement (Second) Conflict of Laws, Section 36, Comment e., p. 150 (1971):

> It is likewise reasonable that a state should exercise judicial jurisdiction over a nonresident individual as to causes of action arising from an act

done, or caused to be done, by him in the state for *pecuniary profit and having substantial consequences there* even though the act is an isolated act not constituting the doing of business in the state. (Emphasis added)

III

PETITIONER'S CONTACTS WITH CALIFORNIA ARE SUFFICIENTLY NUMEROUS THAT THE EXERCISE OF PERSONAL JURISDICTION OVER HIM THERE IS REASONABLE.

Petitioner owns an international corporate empire. He and the corporations bearing his name are not small businesses which happen to have some business contacts outside of their home state. Rather, they are part of a complex and widespread warehousing enterprise which intruded into California, claimed the benefits and protections of California law, and damaged Californians. It is precisely this sort of corporate empire which in fairness and justice should be subject to the jurisdiction of courts in states in which it has business contacts. See *McGee v. International Life Insurance, supra,* 355 U.S. at 222-223.

Even if this litigation had not arisen out of business transacted here, petitioner's contacts with California have been sufficiently numerous and of such duration that he should be subject to personal jurisdiction in that State. Restatement (Second) Conflict of Laws, Section 35, Comment 1. (1971). As the California Supreme Court stated in *Buckeye Boiler*

Co. v. Superior Court, 71 Cal.2d 893, 900, 80 Cal. Rptr. 113 (1969):

> . . . [A] nonresident defendant which derives economic benefit from activity in the forum state and thus does more than a purely local business ordinarily has very little basis for complaining of inconvenience when required to defend itself in that state.

As a result of their nationwide business activities, both petitioner and the Overmyer empire have predictably been parties to litigation throughout the United States. Whatever "burden" or "inconvenience" the petitioner may suffer as a result of this litigation, it is the necessary result of his nationwide conduct. Since petitioner's obligations must be decided under California law, disposition of this matter by courts in California served "the orderly administration of the laws." *Buckeye Boiler Co. v. Superior Court, supra,* 71 Cal.2d at 899.

Petitioner suffered no inconvenience whatever in defending himself, save for the necessity of employing local counsel to defend the action. He was not required to travel to California for depositions since respondents did not depose him, relying instead on answers to interrogatories. Petitioner was not required to travel to California for trial, since the matter was tried on a stipulation of an agreed statement of facts. He was no more inconvenienced by hiring a lawyer to defend himself than if he had been sued in New York, and any such inconvenience was merely equal to that suffered by respondents. Trial in California was eminently fair.

The statements of the court in *Gardner Engineering Corp. v. Page Engineering Company, supra,* 484 F.2d at 33, are particularly apropos:

> Since venue is a procedural rule of convenience, the convenience of the aggrieved party should be first accommodated.
>
> ***
>
> This enlargement of the venue rules must necessarily recognize that whenever a large business entity thrusts itself into a business transaction far from its corporate home that it may well subject itself to the defense of suits in that new jurisdiction.

IV

THE CALIFORNIA CASES CITED BY PETITIONER ARE INAPPOSITE AND PRESENT NO QUESTION APPROPRIATE FOR REVIEW ON WRIT OF CERTIORARI

Petitioner cites six California State decisions in support of his argument that the courts of that State would reject jurisdiction over him. To the contrary, the cases upon which he relies are all distinguishable, and the legal principles expressed in them support the exercise of jurisdiction over petitioner in that State under the circumstances here.

A. Each case was decided on its unique facts.

Petitioner's citation of *Buckeye Boiler Co. v. Superior Court, supra,* is surprising, for the Court there *upheld* personal jurisdiction over an out-of-state corporation which had manufactured a pressure tank which eventually exploded in California, injuring the plaintiff. The Court so held, despite the fact the defendant had no agent, office, sales representative, exclusive agency or sales outlet, warehouse, stock of merchandise, property, or bank account in California. It did not sell on consignment to, or have a commission agreement with, any person or entity in the state. Buckeye's only tie to California involved the sale of pressure tanks to another out-of-state corporation which in turn used the tanks in assembling other products in California. Petitioner here, unlike the defendant in *Buckeye,* has done more than merely transact business outside California which affected California residents; he has contracted directly with numerous California residents, obligating himself to perform within the State.

Belmont Industries, Inc. v. Superior Court, 31 Cal.App.3d 281, 107 Cal.Rptr. 237 (1973), is distinguishable on its facts. The corporate defendant there was engaged in the fabrication and erection of structural steel framework for construction projects on the East Coast of the United States. It was not authorized to do business in California, never had an office or an agent in that State, never sold or purchased any goods there, and, prior to the transactions which gave rise to the litigation, never engaged in any activity whatever in California. It contacted a California corporation, requesting that the latter submit a bid to do drafting work for a construction project in Maryland. The California corporation sent a representative to Pennsylvania to confer about the job, and the Pennsylvania corporation subsequently

mailed a purchase order confirming the award of the contract. The California Court rejected jurisdiction, emphasizing that the contract was consummated outside of California and that it did not call for any performance in California by the defendant. *Id.*, 31 Cal.App.3d at 285, 288. The case before this Court is entirely different. For example, the negotiations leading up to the agreements on both the lease and the guaranty were held in California; the contract was consummated in California; petitioner was required to perform in California; and petitioner has numerous and extensive business dealings in California in addition to the contract which gave rise to the current litigation.

Tiffany Records, Inc. v. M. B. Krupp Distributors, Inc., 276 Cal.App.2d 610, 81 Cal.Rptr. 320 (1969), concerned the amenability to personal jurisdiction of certain out-of-state corporations which had purchased phonograph records from the plaintiff. The records were shipped from California to the defendants and distributed by them in their local areas. At no time did any of the defendants come to California in connection with these purchases. While a few of the defendants made isolated sales of records in California, none of those sales involved records purchased from the plaintiff. Conversely, the plaintiff had sent its employees outside the State to solicit business, and the court emphasized the hardship on the defendants of having to produce business records and witnesses in California. *Id.*, 276 Cal.App.2d at 619. The instant case is entirely different. Petitioner and his

companies solicited business in California; petitioner himself does business here; the obligations which he guaranteed were made and to be performed in California; those obligations expressly claimed jurisdiction in California courts and invoked California law; trial of the matter in California in fact involved no inconvenience to appellant.

Interdyne Co. v. SYS Computer Corp., 31 Cal.App. 3d 508, 107 Cal.Rptr. 499 (1973), involved the sale of computer equipment by a California corporation to one located in New Jersey. Contacts between the parties began when a sales representative of the plaintiff California corporation solicited business from the defendant in New Jersey, and a contract was consummated as a result of negotiations between the parties by letter and telephone. The equipment was shipped by the plaintiff to the defendant, and the plaintiff sued because it had not been paid. The court there held that minimum contacts with California were missing because, apart from the contracts which were the basis of litigation, the defendant had no contacts with California. The case is distinguishable. The negotiations which led up to the contract here took place in California; petitioner has been present in California on numerous occasions for the transaction of business; petitioner has participated in many identical transactions with California residents.

Cornell University Medical College v. Superior Court, 38 Cal.App.3d 311, 113 Cal.Rptr. 291 (1974), involved the amenability to personal jurisdiction of a

non-profit educational institution which contracted by mail to purchase certain scientific equipment from a California corporation. The equipment was damaged in shipment, and the California corporation's insurer refused to pay for the damage. The corporation sued the insurer, and the insurer cross-complained against the college. The college's only contacts with California, aside from the purchase of the equipment, involved sending brochures descriptive of its medical school to California universities, interviewing prospective medical students in California, and holding a banquet in San Francisco. The college's contacts with California were entirely by mail. It had purchased the equipment for educational and scientific purposes, with no intent to encourage or enhance its economic position in California. *Id.*, 38 Cal.App.3d at 316-318. Petitioner's contacts with California dwarf those of the college in that case. Furthermore, Overmyer, unlike Cornell, had a strong pecuniary interest in the transaction which gave rise to litigation.

B. Sibley is distinguishable.

Petitioner's heavy reliance upon *Sibley v. Superior Court,* 16 Cal.3d 442, 128 Cal.Rptr. 34, 546 P.2d 322 (1976), is misplaced. *Sibley* is distinguishable on its facts, so that its legal conclusions are not applicable to this litigation. Plaintiff was a limited partnership having its principal place of business in California. It formed a limited partnership in California for the purpose of operatng two mobile home parks in Georgia. Under the latter partnership agreement, the general partner agreed to make certain monthly payments to plaintiff. Sibley was a Florida resident and was one of three guarantors of the performance by the general partner of its partnership agreement.

Sibley's guaranty was his only connection with the transaction. He was not a party to the partnership agreement and took no part in its negotiation. He did not own any real or personal property in California and did not have any business interests or relations with California except as trustee of a testamentary trust owning property in the State. He had not physically been present in California for over three years, and his presence at that time was in connection with a matter unrelated to the transaction in litigation.

California rejected jurisdiction over Sibley because of the limited nature of his contacts with that State. Unlike petitioner, he had no substantial contacts with California. Unlike petitioner, Sibley had not purposely availed himself of the privilege of conducting business in California or of the benefits and protection of California laws. Unlike petitioner, there was no indication in the record that Sibley had anticipated that he would derive any economic benefit as a result of his guarantee. *Id.,* 16 Cal.3d at 447-48.

The only question presented in *Sibley* was whether jurisdiction could constitutionally be asserted over a nonresident individual "solely by reason of his execution and alleged breach of a guarantee agreement regarding payment of monies owing to a California corporation." *Id.,* 16 Cal.3d at 444. Here, in contrast,

jurisdiction is asserted over appellant because of numerous factors in addition to the mere execution and breach of a guaranty regarding payment of monies in California. The exercise of jurisdiction over appellant is entirely consistent with traditional notions of fair play and substantial justice.

Furthermore, the Court in *Sibley* specifically noted that many of these factors were absent in the case before it, implying that had they been present, the assertion of jurisdiction would have been reasonable.

i. Petitioner here unconditionally guaranteed a lease which, by its terms, was specifically subject to the jurisdiction of California courts and interpreted under California law.

The record in *Sibley* did not indicate that Sibley had purposely availed himself of the privilege of conducting business in California or of the benefits and protection of California laws. In contrast, petitioner here both accepted the binding effect of California law in interpreting his obligations and specifically accepted the jurisdiction of California courts. In guaranteeing performance of all covenants and conditions at the times and in the manner and mode provided in the lease, appellant explicitly accepted the terms of section 26.04 of the lease, which provided for the benefits and protection of both California law and California courts. No comparable provisions were presented in the partnership agreement or the guaranty in *Sibley*.

ii. Petitioner here had a strong pecuniary interest in executing the guaranty.

The record in *Sibley* did not indicate that Sibley anticipated that he would derive any benefit as a result of his guaranty. It was this absence of any "indication that petitioner intended to conduct business or in any other way directly or indirectly gain from dealings in this state," *id.*, 16 Cal.3d at 447-48, that, in the view of the California Supreme Court, distinguished *Sibley* from the numerous recent California decisions, cited at 16 Cal.3d at 447, which have upheld jurisdiction over nonresident defendants.

In sharp contrast to *Sibley*, the uncontradicted evidence and the stipulation of agreed facts presented to the District Court establish that petitioner had a strong pecuniary interest in executing guaranty. His companies received cash for the sale of the warehouse in the amount of $340,000 and retained possession of the warehouse under the lease which petitioner guaranteed. Through a wholly owned corporation, petitioner controlled all of the stock of the lessee. He was both chairman of the board and chief executive officer of the lessee and chairman of the board of the parent corporation. He had a beneficial interest in the profits which the parent and the lessee were to reap in the transactions with respondents. Unlike Sibley, petitioner clearly executed the guaranty so he would derive a substantial economic benefit. Moreover, his execution of the guaranty was part of a continuing course of conduct which affected many California residents in addition to respondents.

Petitioner's contention that his pecuniary interest in executing the guaranty was negated by the transfer of his ownership of D. H. Overmyer Co., Inc. (Ohio) in June, 1969, is absurd. The transfer occurred *after* the sale and leaseback and the execution of his personal guaranty. If *Sibley* stands for the proposition that it would be unreasonable to exercise personal jurisdiction over a nonresident guarantor who does not *anticipate* or *intend* to obtain any economic benefit as a result of his guaranty, that proposition is of no avail to petitioner. Petitioner did anticipate and intended to reap economic gain as a result of the transaction. He owned all of the beneficial interest in the corporation whose obligations he guaranteed. He continued to be employed in high executive capacities by both of the affected corporations. Any profits earned from the transaction with respondents were reflected in the consideration received by him upon the subsequent sale of his interest in his corporations.

iii. Petitioner here has substantial business contacts in California.

In finding that the exercise of personal jurisdiction over him would be unreasonable, the Court in *Sibley* specifically noted that Sibley "does not own any real or personal property in this state, and does not have any business interests or relations with California except as trustee of a testamentary trust owning property in Cambria, California." 16 Cal.3d at 445.

In contrast, petitioner is an officer and director of at least one California corporation. (Appendix I) He

visits California in connection with the operations of his various corporations. (Appendix E) He has personally participated in meetings in California regarding the business of his several corporations. (A. 47) His corporations sold many warehouses to California residents other than the plaintiffs *(Id.)*, and he personally guaranteed the obligations of his corporations to many California residents (Appendix F). He is involved in other California litigation (Appendix J). These contacts with California are not merely isolated incidents but an integral part of the operations of petitioner's empire.

iv. Petitioner here participated in the negotiations of the lease and guaranty.

In *Sibley*, the guarantor took no part in the negotiation of the primary agreement. 16 Cal.3d at 445. In contrast, there was substantial evidence before the District Court and the Ninth Circuit that petitioner participated in the negotiation of the underlying leasehold obligations through his attorney. Mr. Richards specifically stated in his affidavit, "Attorney James R. B. Fitzsimmons purported to represent both defendant Daniel H. Overmyer and D. H. Overmyer Co., Inc. (Ohio), and its subsidiaries, in the aforementioned negotiations." (A. 47-48) Dr. Forsythe stated that it was his understanding that Fitzsimmons was "an attorney at law representing D. H. Overmyer Co., Inc. (Ohio), and D. H. Overmyer Co., Inc. (Oregon), and defendant Daniel H. Overmyer." (A. 44) Mr. Wilson stated, "These negotiations were carried on for the D. H. Overmyer Co.,

Inc. and defendant, Daniel H. Overmyer, individually by J. R. Fitzsimmons, assistant secretary of the corporation." (Appendix H) Even if Mr. Fitzsimmons had not represented petitioner personally, petitioner nevertheless participated in the negotiations through Mr. Fitzsimmons by telephone. (A. 44, 47-48. Appendix H) In contrast with *Sibley,* the preponderance of the evidence before the District Court and the Ninth Circuit was that petitioner actually took part in the negotiation of both the underlying obligation and his own guaranty.

The only arguable similarity between this case and *Sibley* is that both involved a suit on a guaranty. The dissimilarities are so numerous that they are overwhelming. Jurisdiction here was not asserted "solely by reason of" appellant's execution and breach of his guaranty. (Compare *Sibley,* supra, 16 Cal.3d at 444)

The facts simply do not support petitioner's argument. Although not disclosed in his petition, petitioner has numerous contacts with California other than the transaction with respondents. Since he personally guaranteed and controlled the performance of this and other corporate obligations in California and elsewhere, petitioner may not now argue that the Ninth Circuit's consideration of his substantial contacts with California is offensive to "traditional notions of fair play and substantial justice."

C. In truth, California courts would have exercised personal jurisdiction over petitioner.

California has provided that its courts "may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Code Civ. Proc. §410.10. This makes California long-arm jurisdiction co-extensive with that allowed by the due process clause of the United States Constitution. *Threlkeld v. Tucker,* 496 F.2d 1101, 1103 (9th Cir. 1974), *cert. denied* 419 U.S. 1032 (1974). *Michigan Nat. Bank v. Superior Court, supra,* 23 Cal.App.3d at 6. As stated by the California Supreme Court in *Sibley:*

> Under Code of Civil Procedure Section 410.10, a California court may exercise jurisdiction over nonresidents on any basis not inconsistent with the United States or California Constitutions. This section manifests an intent to exercise the broadest possible jurisdiction, limited only by constitutional considerations. [citations omitted] As a general constitutional principle, a court may exercise personal jurisdiction over a nonresident individual so long as he has such minimal contacts with the state that ". . . the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" [citations omitted]

Sibley v. Superior Court, supra, 16 Cal.3d at 445.

Petitioner oversimplifies California decisions in regard to the exercise of personal jurisdiction over nonresident defendants. California does not espouse a mechanical doctrine that the mere mailing of a document to that State deprives the State of jurisdic-

tion. Rather, California has adopted the "minimum contacts" standard. In addition to the foregoing authorities, see such cases as *Abbott Power Corp. v. Overhead Electric Co.,* 60 Cal.App.3d 272, 280-83, 131 Cal. Rptr. 508 (1976); and *Quattrone v. Superior Court,* 44 Cal.App.3d 296, 302-306, 118 Cal.Rptr. 548 (1975).

By its jurisdictional rule, California has inherently espoused a rule of reason, in which the quality and nature of petitioner's activities in California and elsewhere, and petitioner's invocation of the benefits and protections of California law, must be analyzed in context. California's rule is one of fairness. The decision of the Ninth Circuit being reasonable in light of the facts, California courts would have reached the same conclusion. The comment in *Martin v. Detroit Lions, Inc.,* 32 Cal.App.3d 472, 108 Cal.Rptr. 23 (1973), is particularly in point:

> A California court may exercise jurisdiction over a nonresident defendant only within the perimeters of the due process clause as delineated by the decisions of the United States Supreme Court. *(International Shoe Co. v. State of Washington,* 326 U.S. 310, [90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057]; *Michigan Nat. Bank v. Superior Court,* 23 Cal.App.3d 1, 6 [99 Cal.Rptr. 823]; Code Civ. Proc., §410.10.) While it has been held that minimum contact for due process requires more than a "foot-fall on the State's soil" *(Erlanger Mills v. Cohoes Fibre Mills,* 239 F.2d 502, 509), where the cause of action arises out of economic activity within the state, the contacts need not consist of repeated or continuous business transactions; an isolated transaction, such as the breach of a contract made and to be performed in the state, may be sufficient. [citations omitted.]

CONCLUSION

The petition discloses no basis for the exercise of this Court's certiorari jurisdiction. No federal question involving the considerations delineated in Rule 19 is presented. What the petition presents is, at best, a disingenuous contention based upon an inadequate analysis of the facts which were before the District Court and the Ninth Circuit. The decision of the Court of Appeals is entirely consistent with constitutional principles and with the decisions of the courts of the State of California.

This petition is but a part of the delaying tactics by which petitioner is attempting to preclude the finality of the judgment which has been entered against him and appears to be but a part of a nationwide pattern of litigation practiced by the petitioner. In addition to his activities with respect to respondents, see *Overmyer v. Fidelity & Deposit Co. of Maryland,* 554 F.2d 539 (2nd Cir. 1977), where his appeal there was described as "a crass misuse of both the state and federal judicial systems to avoid the payment of a judgment."

For the above reasons, respondents respectfully request that the Petition for a Writ of Certiorari be denied forthwith.

Dated: August 25, 1978

Respectfully submitted,

JEROME SAPIRO, JR.,

TOBIN & TOBIN,

Attorneys for Respondents.

(Appendices Follow)

Appendices

Appendix A

(Excerpt from Plaintiffs' Exhibit 11 at Trial)

July 23, 1974

ROY BABITT, Bankruptcy Judge:

The parent debtor and forty of its subsidiaries each filed its own petition for an arrangement under the provisions of Chapter XI of the Bankruptcy Act, Sections 301 *et seq.*, 11 U.S.C. §§701 *et seq.*[1] Shortly after the filing of these petitions, a receiver was appointed by a Judge of the District Court to operate the business of the debtor and those subsidiaries set forth in the above caption.[2]

At the onset, it is necessary to broadly structure the main business of these companies, which, for purposes of facility, will be considered as the business of the parent debtor.[3] The debtor is engaged in the business of long term leasing of warehouse space from landlords under lease-back arrangements and short term subleasing of such space to subtenants at rentals in excess of that payable by the debtor to its landlord under the lease-back. This business began when the debtor purchased parcels of land and ar-

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[1]These were original petitions under Section 322, 11 U.S.C. §722, as no proceedings were pending when the jurisdiction of this court was invoked. Compare Section 321, 11 U.S.C. §721, which contemplates the filing of a petition for Chapter XI relief during the pendency of a bankruptcy.

[2]Two of the petitions have been dismissed; some are not affected by this decision which covers disputes arising in twenty of the cases as will be seen.

[3]The court uses the singular "debtor" to denote each of the debtors involved in these controversies since "the identity and individuality of the respective corporate entities are not relevant here . . ." *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) at 179.

ranged for the financing necessary for it in order to construct a warehouse on the land. In the finished structure, the debtor would lease space to others or operate a public warehousing enterprise for itself.[4] When the newly constructed warehouses had thus become viable, the land and buildings were sold to an investor subject, of course, to the outstanding encumbrances. Under the terms of the sale, the debtor would take back a lease from the purchaser in a typical lease-back situation, and the debtor would continue to operate the warehouses, collecting from the subtenants the rents called for by the leases between the debtor and the subtenants while the debtor would pay to the landlord-purchaser the amounts reserved by the sale and lease-back instruments. In the lease-backs the typical lease was a net-net lease whereby the landlord-purchaser was to receive fixed rent from the debtor during the life of the lease, the term of which was usually in the vicinity of thirty years including two option periods, but with a reduced rent to be paid by the debtor during those option periods. Under the net-net leases the debtor, as tenant, was obliged to maintain the property and usually to pay all real estate and other taxes as well as mortgage payments. It is noted here that while the lease between the debtor and the landlord-purchaser covered, with the options, a rather extensive period of time, the debtor's subleases with subtenants occupying the warehouse facilities were for short terms, and the

[4]The public warehouse aspect of the debtor's business was terminated shortly after the Chapter XI petitions were filed.

total of the rents were in excess of the amount due the landlord-purchaser under the terms of the sale and lease-back to the debtor. This complex and widespread warehousing enterprise was described to the Supreme Court as "having built 'in three years . . . 180 warehouses in thirty states.'" *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972) at 179. Thus the business of the debtor, once it had terminated its own public warehouse operation, was basically that of landlord to subtenants, its profit in this operation being generated by the difference between the aggregate of the rents due under the subleases in a given warehouse and the amount for which the debtor was liable to the landlord-purchaser. It was expected, as the option terms disclose, that during the option periods the debtor would generate larger income from its subleases during a period when its own payment to the landlord-purchaser was reduced. On their part the landlord-purchasers received a substantial fixed income on their investments and whatever benefits the intricate tapestry of the internal revenue law might bestow on purchaser-lessors. There is evidence in the record that by late 1973, the debtor's empire had been enhanced from the 180 warehouses noted by the Supreme Court to well over 200.

When the Chapter XI petitions were filed, virtually all of the debtors were in substantial arrears to these landlord-purchasers.[5] While the total amount of the

[5]The debtor also owned approximately twenty properties in fee. The payment due under many of the mortgages on such properties were in substantial arrears when these Chapter XI petitions came to this court.

arrearages has not been exactly ascertained, it is nowhere in dispute that the sum is well in excess of $12,000,000, and the landlord-purchasers represent the largest of the creditors, by far, with whom the debtor hopes to deal in these arrangement proceedings. At the time the petitions were filed the landlord-purchasers presented varying fact patterns in connection with what seems, from the record, to have been a continuing dialogue between them and their respective debtors concerning nonpayment of rent or otherwise denominated amounts reserved under the lease-backs, nonpayment of taxes, default of mortgage payments, lapse of insurance, non-repairs, etc. Some of the landlords had already been given possession in State Court proceedings. Some landlords had been given an assignment by the debtor of all rents due from the debtor's subtenants. For some properties, receivers had been appointed. Some landlords had begun proceedings in State Courts to regain their property but further proceedings to regain possession were stayed by this court.[6] Upon the filing of the petitions, this court entered orders staying the continuation or commencement of proceedings against the debtor affecting its property, it being clear that

[6]The caption of this action sets forth the name of the parent and all its subsidiaries in various states in which warehouses are operated by the particular corporate debtor under lease-back arrangements. The separate corporations appear to have contemplated the operation of the debtor in a particular state so that, for example, the Minnesota company would refer to warehouses in Minnesota. Not all of these debtors are involved in the instant litigation. However, for convenience, the court captions this decision in keeping with the separate petitions filed by each of the companies operating under lease-back arrangements.

the leases between the debtor and the purchaser-landlord and the subleases between the debtor and the warehouse operators were assets of these estates and therefore subject to the court's protection.

Within days of the filing of the petitions, virtually every landlord-purchaser began proceedings before this court either to recover its particular warehouse or to be permitted to proceed in other courts to recover such property. The litany was the same. The debtor was in substantial default in the payment called for by the net-net leases, that the properties were in need of repair for want of which the landlord's estates were being impaired, that mortgage foreclosures were threatened, that adverse tax action was being taken because of the debtor's default of the payment of taxes, that the landlords were obliged to make payments just to preserve the property, and that not only did the defaults by the debtor in making the payments constitute such default as to justify a conclusion that the leases had thereby terminated but the filing of the Chapter XI petitions by these debtors also constituted the happening of such event as to support the conclusion that the leases had terminated for that reason.

Appendix B

(District Court Docket)

PROCEEDINGS

C-73-1900 WHO

Date	
1974	
Sep. 17—15.	Filed Pltfs. 1st Interrogs to Deft.
Oct. 8—16.	Filed Clerk's Not of Pre Disc Conf., 12/16/74, 9 am
Oct. 24—17.	Filed STIP ex time to 11-15-74 to deft to ans interrogs.
Nov. 15—18.	Filed Stip & ORD ext deft's time to resp to interrogs to 11-25-74 -LH
Nov 21—19.	Filed Defts. Afft of Mailing next above.
Nov. 25—20.	Filed Defts. Ans to Pltfs 1st Interrogs.
Nov. 26—21.	Filed affidavit of mailing by deft.
Dec. 16	ORD: Pre Disc Conf., cont to 5/7/75, 9am for PT Conf, 5/19/75 10am for Trial-WHO
Dec. 16—22.	Filed Clerk's Not of PT Conf., 5/7/55, 9am
1975	
Mar. 4—23.	Filed Pltfs Sub of Attys
Apr. 22—24.	Filed pltfs' P/T Stmt
25.	Filed pltfs' Trial Brief LODGED Findings of Fact & Conclusions of Law
26.	Filed Crt. of mailing of pltfs' P/T Stmt, Trial Brief, Findings of Fact, etc.
27.	Filed deft's P/T Stmt

Apr. 28—28. Filed deft's Findings of Fact & conclusions of Law
29. Filed deft's Trial Brief
30. Filed pltf's proposed exhbts
31. Filed pltfs' Object to deft's exhbt "A" (File Folder #3)
Apr. 29—32. Filed pltfs' Cert. of Mailing of item #31
May 2—33. Filed pltfs' Reply to deft's Trial Brief
34. Filed Stip & ORD re: compliance w/ not. of P/T conf –WHO
May 6 ORD: P/T conf cont to 5-9-75/10am –WHO
9—35. Filed deft's Reply to pltf's Trial Brief ORD: P/T conf; cont to 5-27-75/4:30 pm for Trial by Ct; Trial to consist of stipulated facts, stip to be filed by 5-19-75, (Trial date of 5-19-75 vacated) –WHO
May 12—36. Filed Joint Req for Ct Setl Conf under L.R. 110
May 19—37. Filed Stip of Agreed Stmt of Facts
38. Filed Afdvt of Max W. Forsythe
May 28—39. Filed afdvt of Jerome Sapiro, Jr.
May 27 ORD: CT TRIAL Stipulated Facts; pltfs' mo to amend complt GRANTED, amend to be filed; deft's mo to reconsider Ord of Judge Burke—DENIED counsel to submit cert memos & briefs by 6-2-75, responses due 6-4-75; fur Trial on 6-5-75/2pm –WHO
40. Filed pltfs' *AMEND TO COMPLT*

June 2—41. Filed deft's Suppl Trial Brief
June 9—42. Filed pltfs' closing trial Brief
June 13 Fur. Court trial: Findings of Fact read into the record Case submitted within 10 days. WHO
June 24—43. Filed letter from Counsel req ext of time
July 1—44. Filed Cert of Counsel re Services Rendered by Attys for Pltf; exhibit attached
July 7—45. Filed pltf's Suppl Cert of Counsel re Services Rendered by Attys for pltf (orig & 2 copies)
July 17—46. Filed *Findings of Fact and Conc of Law* WHO
July 21—47. Entered JUDGT: pltfs to recover $90,618.17 with interest and $11,796.38 in costs of action and atty's fees (filed 7-17-75) WHO
July 21—Copies mailed to parties of record
July 23—48. Filed deft's Not. of Disapproval and Objection to Findings

Appendix C
(Excerpt from Lease)

ARTICLE XXVI

JURISDICTION

Section 26.01. It is specifically understood and agreed that this lease agreement is entered into in the State of California and the parties hereto agree that the same shall in every respect be subject to the jurisdiction of the courts of the State of California, and shall be interpreted in accordance with the law of the State of California. In the event that any portion of this lease agreement should, despite the provisions of this paragraph, be held to be subject to the jurisdiction or the law of any other State, the remaining provisions of this agreement shall be unaffected by such determination and shall be interpreted in accordance with the laws of the State of California and shall be subject to the jurisdiction of the courts of that State.

Appendix D

(Clerk's Transcript p. 100 before Ninth Circuit)

ARRANGEMENT

United States District Court,
Southern District of New York.

In the Matter of:

	Tax I.D. Nos.	Debtor Nos.
D. H. Overmyer Co. Inc. (Alabama)	13-2546496	No. 73 B 1126
D. H. Overmyer Co. Inc. (Arizona)	86-0194429	No. 73 B 1127
D. H. Overmyer Co. Inc. of Ohio	34-4472939	No. 73 B 1128
D. H. Overmyer Co. Inc. (Ohio)	34-4445361	No. 73 B 1129
D. H. Overmyer Co. Inc. (California)	13-2550218	No. 73 B 1130
D. H. Overmyer Co. Inc. (Colorado)	84-0532888	No. 73 B 1131
D. H. Overmyer Co. Inc. (Connecticut)	13-2554450	No. 73 B 1132
D. H. Overmyer Co. Inc. (Delaware)	13-2546497	No. 73 B 1133
D. H. Overmyer Co. Inc. (Florida)	59-1088267	No. 73 B 1134
D. H. Overmyer Co. Inc. (Georgia)	58-0948051	No. 73 B 1135
D. H. Overmyer Co. Inc. (Illinois)	13-2546587	No. 73 B 1136
D. H. Overmyer Co. Inc. (Indiana)	13-2546498	No. 73 B 1137
D. H. Overmyer Co. Inc. (Kansas)	13-2584215	No. 73 B 1138

D. H. Overmyer Co. Inc. (Kentucky)
13-2546499 No. 73 B 1139
D. H. Overmyer Co. Inc. (Louisiana)
72-0594172 No. 73 B 1140
D. H. Overmyer Co. Inc. (Maryland)
13-6180154 No. 73 B 1141
D. H. Overmyer Co. Inc. (Michigan)
13-2546500 No. 73 B 1142
D. H. Overmyer Co. Inc. (Massachusetts)
13-6177004 No. 73 B 1143
D. H. Overmyer Co. Inc. (Minnesota)
41-0885247 No. 73 B 1144
D. H. Overmyer Co. Inc. (Mississippi)
13-2546501 No. 73 B 1145
D. H. Overmyer Co. Inc. (Missouri)
43-0827644 No. 73 B 1146
D. H. Overmyer Co. Inc. (Nebraska)
13-2546502 No. 73 B 1147
D. H. Overmyer Co. Inc. (Nevada)
13-2546503 No. 73 B 1148
D. H. Overmyer Co. Inc. (New Jersey)
13-2546504 No. 73 B 1149
D. H. Overmyer Co. Inc. (New Mexico)
13-2541696 No. 73 B 1150
D. H. Overmyer Co. Inc. (New York)
13-2530444 No. 73 B 1151
D. H. Overmyer Co. Inc. (North Carolina)
56-0843385 No. 73 B 1152
D. H. Overmyer Co. Inc. (Oklahoma)
73-0750609 No. 73 B 1153
D. H. Overmyer Co. Inc. (Oregon)
13-2550220 No. 73 B 1154
D. H. Overmyer Co. Inc. (Pennsylvania)
13-6175691 No. 73 B 1155
D. H. Overmyer Co. Inc. (Rhode Island)
13-2584216 No. 73 B 1156

D. H. Overmyer Co. Inc. (Tennessee)
13-2546506 No. 73 B 1157
D. H. Overmyer Co. Inc. (Texas)
11-2064895 No. 73 B 1158
D. H. Overmyer Co. Inc. (Utah)
13-2541695 No. 73 B 1159
D. H. Overmyer Co. Inc. (Virginia)
54-0760271 No. 73 B 1160
D. H. Overmyer Co. Inc. (Washington)
13-2550221 No. 73 B 1161
D. H. Overmyer Co. Inc. (Wisconsin)
13-2546507 No. 73 B 1162
of 201 East 42nd Street, New York, N. Y. Debtor Nos. (as above).

NOTICE IS HEREBY GIVEN that on November 16th, 1973 the above named debtors filed a petition under Chapter XI of the Bankruptcy Act and States that they intend to propose an arrangement with their unsecured creditors. A first meeting of creditors will be held before the undersigned Bankruptcy Judge, in the courtroom, Room 201, United States Court House, Foley Square, New York, N. Y. 10007, on January 29th, 1974, at 1:00 P.M., at which place and time the creditors may attend, prove their claims, nominate a trustee, appoint a committee of creditors, examine the debtor and transact such other business as may properly come before said meeting, including hearing and determining whether the debtor should be adjudged a bankrupt, and bankruptcy proceeded with, or the proceedings dismissed on any of the grounds specified in Section 376 of the Act.

NOTICE IS ALSO GIVEN that the 28th day of February, 1974 is hereby fixed as the last day for the filing of applications, as provided in Section 17C(2) of the Bankruptcy Act, to determine the dischargeability of debts claimed to be nondischargeable pursuant to Clauses (2), (4) or (8) of Section 17A of the Bankruptcy Act.

Accompanying this notice is a summary of the assets and liabilities Scheduled by said debtor.

DATED: New York, New York
January 9, 1974

ROY BABITT
Bankruptcy Judge

Notice

You must file a claim before confirmation in order to participate in the distribution of the consideration, if any, to be deposited.

Appendix E

(Answer to Plaintiffs' First Interrogatories)

INTERROGATORY NO. 7

Have you made visits to California during which you transacted business from January 1, 1967 to the present? If so, state for each visit:

(a) The purpose of such visit;

(b) The dates of arrival and departure;

(c) Your address(es) while in California;

(d) With whom you met;

(e) The dates of such meetings; and

(f) The purposes of such meetings.

RESPONSE TO INTERROGATORY NO. 7

(a) The purpose of all visits was to meet with general managers and vice presidents of D. H. Overmyer Co., Inc. (California) and review progress in their operations.

(b) From January 1, 1967, to November, 1973, I visited California an average of two times per year in my capacity as Chairman of the Board and chief executive officer of D. H. Overmyer Co., Inc. (California).

OBJECTION is made to Interrogatory No. 7 insofar as it calls for specific dates of arrival and departure, in that it is unduly burdensome and such information is not readily available to Defendant; the information is irrelevant to the subject matter

of this action as it is not contended that the Defendant personally engaged in any of the activities which form the subject matter of this action; the question is too broad and it is not calculated to lead to discovery of admissible evidence.

(c) As a rule, I stayed in various hotels while in California.

OBJECTION is made to Interrogatory No. 7, upon the same grounds as set forth immediately above, insofar as it requests specific addresses.

Appendix F

(Answer to Plaintiffs' First Interrogatories)

INTERROGATORY NO. 10

From January 1, 1967 to the present, have you, D. H. Overmyer, Inc. (Ohio) or any of its subsidiaries guaranteed the obligations of any corporate entity to any California resident? If so, state for each such obligation guaranteed:

(a) The name and address of each obligee;

(b) The name and address of each obligor;

(c) The obligation guaranteed; and

(d) The consideration given for the guaranty.

RESPONSE TO INTERROGATORY NO. 10

D. H. Overmyer Co., Inc. (Ohio) and I have guaranteed obligations to not less than ten California residents. The records necessary to formulate an accurate answer to this interrogatory are not available because of several moves and because the corporate entities have filed proceedings under Chapter XI of the Bankruptcy Act.

OBJECTION is made to Interrogatory No. 10 insofar as it calls for specific information about such guaranties on the grounds that it is unduly burdensome, too broad, irrelevant, and not calculated to lead to discovery of admissible evidence, because the records are under the control of a receiver pursuant to authority of the Bankruptcy Court and because guar-

anties, other than the one in this case which is admitted, are not pertinent to the question of amounts due, if any, under the lease and guarantee in this case.

Appendix G

(Excerpt from Lease)

This Lease, entered into this 18th day of October 1968 between

Max W. Forsythe

(hereinafter referred to as the LANDLORD) who currently resides at Atherton, California to D. H. OVERMYER CO., INC. (hereinafter referred to as the TENANT), an Oregon corporation with administrative offices at 201 East 42nd Street, Manhattan, New York, New York 10017.

The Landlord owns title to certain land, (hereinafter referred to as the Demised Premises), the accurate description of which Demised Premises is fully set forth in Schedule A, which Schedule is annexed to and hereby made a part of this lease. The Landlord is willing to make and the Tenant is willing to take a leasehold in these premises. Negotiations between representatives of the Landlord and those representing the tenant have culminated in the formulation of a Leasehold, the precise terms, conditions and provisions of which follow.

Section 1.01. Landlord hereby leases to Tenant and Tenant hereby hires from Landlord the real property, the buildings, other improvements thereon, and appurtenances identified above as the Demised Premises, together with all rents, issues and profits, easements, tenements, appurtenances, hereditenants

[sic] fixtures, rights and privileges thereto belonging, or in any way appertaining. The Demised Premises are leased subject to the existing state of the title, to encumbrances, covenants, easements, reservations of rights of way, if any, any encroachment over any street or adjoining property, any state of facts which an accurate survey or physical inspection might show, zoning regulations, restrictions, resolutions and ordinances, building restrictions and all governmental regulations now in effect or hereafter adopted by any governmental authority having jurisdiction.

Section 1.02. The Tenant, its successors and assigns, shall have and hold the Demised Premises upon and subject to the terms, covenants, agreements and conditions herein contained, for the term herein specified or until sooner terminated by law or as herein provided.

ARTICLE II

Term

Section 2.01. This Lease shall be for a term of twenty years, commencing on October 18, 1968.

ARTICLE III

Rent

Section 3.01. Tenant shall pay to Landlord, at either his principal office or such other place as Landlord shall specify in writing, rent, in such coin or currency of the United States of America as at the time of payment shall be legal tender for all debts, public

and private, in the amount of $7,295.83 per month payable in advance on the 20th day of each and every month throughout the term of this lease, ... [text lined out] .....

Appendix H

(Declaration of John P. Wilson)

DECLARATION

The undersigned hereby states as follows:

During the month of October, 1968, I represented M.W. Forsythe, Helen Forsythe, Bush Hayden and Jean Mulliken in connection with the purchase from and lease back to D.M. Overmyer Co., Inc., an Oregon corporation, certain real property, more particularly described in a lease dated October 18, 1968, between Max W. Forsythe and D.H. Overmyer Co., Inc.

The negotiations for the purchase of said land and the lease back to the Overmyer company occurred in my offices in Menlo Park, California over a period of six to ten days, ending October 18, 1968. These negotiations were carried on for the D.H. Overmyer Co., Inc., and defendant, D.H. Overmyer, individually, by J.R. Fitzsimmons, assistant secretary of the corporation. It was my understanding from Mr. Fitzsimmons that he did not have unlimited authority from either the corporation or defendant, D. H. Overmyer, and as a consequence, the negotiations were interrupted one or more times while Mr. Fitzsimmons communicated with the Overmyer company, or defendant, D.H. Overmyer. During the course of the negotiations, I did, on behalf of the lessees, request of Mr. Fitzsimmons that he obtain the personal guaranty of defendant, D.H. Overmyer of the per-

formance of all of the terms and conditions of the lease. As a result of this, I received a telegram dated October 18, 1968, and this telegram was followed by a written personal guaranty of said defendant, D.H. Overmyer, dated October 21, 1968.

It was my understanding that Mr. Fitzsimmons was representing defendant, D.H. Overmyer, individually, and these negotiations and this understanding was reinforced particularly by the telegraphic and written response of said defendant to my request of Mr. Fitzsimmons that defendant, Overmyer, supply his personal guaranty.

I, John P. Wilson, declare under penalty of perjury that the foregoing is true and correct.

Executed on March 8, 1974, at Menlo Park, California.

/s/ John P. Wilson
John P. Wilson

Appendix I

(Answer to Plaintiffs' First Interrogatories)

INTERROGATORY TO NO. 8

Are you an officer, director or employee of any corporation which is now doing or has done business in California? If so, state for each such corporation:

(a) Your position or title;

(b) The inclusive dates of your association; and

(c) Your responsibilities.

RESPONSE TO INTERROGATORY NO. 8

(a) Chairman of the Board, President, and Treasurer of D. H. Overmyer Co., Inc., a California corporation.

(b) Since November 1973.

(c) Responsibilities are as indicated by position held.

OBJECTION is made to this interrogatory insofar as it requests a listing of specific responsibilities on the grounds that it is unduly burdensome and too broad; and all inclusive lists of responsibilities cannot be obtained; the information is irrelevant and not calculated to lead to discovery of admissible evidence, for the reasons set forth in the objection to Interrogatory No. 3, which are incorporated herein by reference.

Appendix J

(Answer to Plaintiffs' First Interrogatories)

INTERROGATORY NO. 11

From January 1, 1971 to the present, have you, D. H. Overmyer, Inc. (Ohio) or any of its subsidiaries been involved in litigation or arbitration in California? If so, state for each such litigation or arbitration:

(a) The plaintiffs;

(b) The defendants;

(c) The title of the court and cause; and

(d) The names and addresses of attorneys for plaintiffs and of attorneys for defendants.

RESPONSE TO INTERROGATORY NO. 11 . .

Yes. D. H. Overmyer Co., Inc. (Ohio), D. H. Overmyer Co., Inc. (California), and I have each been involved in litigation in California.

OBJECTION is made to Interrogatory No. 11 insofar as it requests more specific information than is given above on the grounds that it is irrelevant, the question is too broad, and the information requested is not calculated to lead to discovery of admissible evidence, for the reasons set forth in the objection to Interrogatory No. 10, which are incorporated herein.